No. 342

AUG 23 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

W. A. GAYLE, CLYDE SELLERS and FRANK PARKS, individually and as members of the Board of Commissioners of the City of Montgomery, Alabama, and GOODWYN J. RUTTENTHAL, individually and as Chief of Police of the City of Montgomery, Alabama,

Appellants,

v.

AURELIA S. BROWDER, and SUSIE McDONALD and CLAUDETTE COLVIN, by Q. P. Colvin, next friend, and MARY LOUISE SMITH, by Frank Smith, next friend, and others similarly situated,

Appellees.

On Appeal From the United States District Court For the Middle District of Alabama, Northern Division

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JURISDICTIONAL STATEMENT

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Appellants,

v.

AURELIA S. BROWDER, and SUSIE MCDONALD and CLAUDETTE COLVIN, by Q. P. Colvin, next friend, and MARY LOUISE SMITH, by Frank Smith, next friend, and others similarly situated,

Appellees.

On Appeal From the United States District Court For the Middle District of Alabama, Northern Division

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Middle District of Alabama, Northern Division, entered on June 19, 1956.

This judgment invalidated certain ordinances of the City of Montgomery [1] and statutes of Alabama [2] requiring segregation of the white and Negro races in buses operated in the City of Montgomery as violative of the Fourteenth Amendment of the Constitution of the United States; and it permanently enjoined and restrained Appellants from enforcing these statutes and ordinances and any other statutes and ordinances which require Appellees or other Negroes similarly situated to submit to segregation in the use of the bus transportation facilities in the City of Montgomery, Alabama, and from doing any acts or taking any action to require the Montgomery City Lines, Inc., a Defendant below, or its drivers, or any other public bus transportation facility, or its drivers, from enforcing such statutes or ordinances requiring the segregation of white and Negro passengers in the operation of public motor bus transportation facilities in the City of Montgomery.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Middle District of Alabama, Northern Division is unreported. The opinion below, findings of fact, conclusions of law, and judgment are attached hereto as Appendix A.

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[1] Chapter 6, Sections 10 and 11, Code of City of Montgomery, 1952.

[2] Section 301 (31a, 31b and 31c) Title 48, Code of Alabama, 1940, as amended.

JURISDICTION

Appellees brought this suit below under Title 28, United States Code, Sections 1331 and 1343 (3) and under Title 42, United States Code, Sections 1981 and 1983. The judgment of the District Court was entered on June 19, 1956, and notice of appeal was filed in that court on June 29, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b).

QUESTIONS PRESENTED

1. Where municipal ordinance and state statute require, under criminal penalty, that operators of public bus lines furnish this transportation facility to members of the white and Negro races on a separate but equal basis, and prohibit under similar penalties integration of the races on such transportation facilities:

(a) Does a federal district court at the suit of certain Negro citizens of this municipality have jurisdiction to enjoin the enforcement of these ordinances and statutes on constitutional grounds?

(b) Is there any federal equity jurisdiction to enjoin the enforcement of these state and municipal criminal laws in this manner in the absence of a showing of threatened irreparable injury both great and immediate to the suitor?

(c) Even if the federal district court has such jurisdiction, should it as a matter of comity withhold its exercise where there is an adequate state procedure for testing the validity of these laws, with ultimate review by the Supreme Court of the United States?

(d) Is there federal equity jurisdiction in such a suit to enjoin the enforcement of these ordinances and statutes?

2. Where the public bus facilities afforded members of the white and Negro races in the City of Montgomery are unquestionably equal, but for separateness, is enforced separation of the races pursuant to statutory requirement *per se* a violation of the Fourteenth Amendment of the Constitution of the United States?

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1.

United States Code, Title 28, Sections 2281, 2284, 1253, 2101 (b).

United States Code, Title 42, Sections 1981 and 1983.

Title 37, Sections 587, 588 and 593, Code of Alabama of 1940, as amended.

Title 48, Sections 301 (31a, 31b and 31c), Code of Alabama of 1940, as amended.

Code of the City of Montgomery, 1952, Chapter 6, Sections 10 and 11; Chapter 1, Section 6.

These statutes and Constitutional provisions are set forth in Appendix B hereto.

STATEMENT

These Appellants are municipal officials of the City of Montgomery, and as such are charged with the enforcement of ordinances relating to public transporta-

tion. Among these ordinances are Chapter 6, Sections 10 and 11, Code of the City of Montgomery, 1952, which require that, "(E)very person operating a bus line in the city shall provide equal but separate accommodations for white people and negroes on his buses, by requiring the employees in charge thereof to assign passengers seats on the vehicles under their charge in such manner as to separate white people from the negroes, where there are both white and negroes on the same car; . . ."

Section 11 of this City Code confers on employees in charge of buses operated in the City of Montgomery the power of police officers for the purpose of carrying out the provisions of Section 10. Criminal penalties for the violation of these Sections are provided in Chapter 1, Section 6, City Code of 1952.

State statutes—perhaps inapplicable within municipalities—require that races be separated on public transportation facilities and impose criminal sanctions for their violation. Title 48, Sections 301(2)A(2), and 301 (31a, 31b and 31c), Code of Alabama of 1940, as amended.

Appellees invoked the jurisdiction of a district court of three judges for the purpose of obtaining a judicial declaration that these ordinances and statutes violated the Constitution of the United States and a permanent injunction against the enforcement of these or similar statutes. Appellees alleged that these state and local requirements violated the Fourteenth Amendment of the Constitution of the United States and denied them liberty without due process of law; equal protection of the laws; and abridged their privileges and immunities.

Appellees are four Negro citizens of Montgomery. The Court below found that each of them has "either been required by a bus driver or by the police to comply with said segregation laws or has been arrested and fined for her refusal so to do." Moreover, "the Plaintiffs, along with most other Negro citizens of the City of Montgomery, have since December 5, 1955, and up to the present time, refrained from making use of the transportation facilities provided by Montgomery City Lines, Inc. Plaintiffs and other Negroes desire and intend to resume the use of said buses if and when they can do so on a nonsegregated basis without fear of arrest." (Appendix A, p. 4a).

The Court below also found that Appellants and the operators of the Montgomery bus lines intended to enforce the statutes and ordinances requiring separate but equal accommodations, and it found that "Without dispute the evidence is to the effect that, other than being separate, such accommodations are equal." (Appendix A, p. 5a).

Nevertheless the Court below held that these enactments violated the Fourteenth Amendment of the Constitution of the United States in that their enforcement deprived Appellees of liberty without due process of law and denied to them the equal protection of the laws.

There was testimony below that these same ordinances had been enforced against another Negro citizen of Montgomery—Rosa Parks. (R. .....) Her conviction in the municipal court had been appealed to the Circuit Court of Montgomery County, Alabama, and thence to the Court of Appeals of Alabama, where it is now pending. (R. .....) The Constitutional

issues presented at bar were also raised in the Parks case.

There was also testimony that two of the Appellees, on prior occasions, had been convicted and fined for violation of the ordinances now drawn in question. (R. .....) Though the statutes of Alabama provide an appeal to the Circuit Court of Montgomery County, Alabama, and then to the appellate courts of Alabama,[3] neither of these parties sought review of their convictions on these occasions. Of course, ultimate review on any federal question was available in this Court.

THE QUESTIONS ARE SUBSTANTIAL

This appeal involves procedural and substantive questions long considered basic in the accommodation of federal and state judicial systems and in the application of the Fourteenth Amendment to the police power of cities and states.

I

The Judgment Below Departs From Principles of Federal Court Procedure Long Considered Essential to a Proper Accommodation of State and Federal Courts.

This appeal seeks review of a failure by the Court below to apply fundamental procedural principles to this case. The district court of three judges should have dismissed this action; or, at least, stayed it pending appropriate suit by Appellees in the Alabama state courts.

1. The Court below has enjoined the application of criminal laws which require segregation of whites and

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[3] Title 37, Sections 587, 588 and 593, Code of Alabama, 1940, as amended.

Negroes on public buses in Montgomery. Thus, its judgment runs squarely counter to *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943).

There certain Jehovah's Witnesses sued in a federal district court in Pennsylvania to restrain threatened prosecution of them by the City of Jeannette and its officials for violation of a city ordinance which prohibited the solicitation of orders for merchandise without first procuring a license from the city authorities and paying a license tax.

The Jeannette ordinance contained criminal penalties for its violation. The petitioners cited prior arrests and convictions by the municipal authorities of other Jehovah's Witnesses for distributing religious literature without the permits required by the ordinance, and complained that continued enforcement threatened them with arrests and prosecutions—in violation of their constitutional rights of freedom of press and religion.

This Court held that even though a federal district court had undoubted jurisdiction to hear and decide the question of the constitutional validity of the Jeannette ordinance, in the absence of a showing of irreparable injury, there was "no ground for supposing that the intervention of a federal court, in order to secure petitioner's constitutional rights, will be either necessary or appropriate." (319 U. S. at 165) The district court, so this Court held, should not have exercised its equity powers to interfere by injunction with threatened criminal prosecutions in a state court.

Moreover, it is especially noteworthy, that this Court in a companion case, *Murdock* v. *Pennsylvania*, 319

U. S. 105 (1943), decided on the same day, held the same underlying ordinance, as applied in an identical context, to be an unconstitutional abridgement of free speech, press and religion. Thus, this Court demonstrated the overriding importance and substantiality of the procedural rule of *Douglas* v. *Jeannette*.

This Court stated:

> "The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. . . .
>
> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. . . . Where the

> threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparably injury 'both great and immediate.'" (319 U. S. at 162-164)

The parallel between this case and *Douglas* v. *Jeannette* is exact. Federal district courts enjoined the enforcement of local laws with criminal sanctions on the ground that the enactments violated the Constitution of the United States as applied to the respective complainants.

State appellate procedures to review convictions for violations of the enactments were available in both cases.

Prosecutions in the state courts have been instituted against other persons arising out of violations of the same enactments in similar factual contexts.

Neither the lower court in *Jeannette* nor the court below in the case at bar found a danger of irreparable injury "both great and immediate" to Appellees or others similarly situated from threatened prosecutions under state and local laws.[4] Indeed, two of the Appel-

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[4] While unnecessary for this Court's consideration of this appeal, it seems apposite to point out that it would be extremely difficult, if not impossbile, for any Court to find irreparable injury "both great and immediate" resulting from threatened prosecution under statutes and ordinances drawn in question in this case. The maxi-

lees had an opportunity to appeal from prior convictions under state law and thereby test the validity of underlying ordinances, and chose not to do so.

Actually, the case at bar is a stronger one for application of the *Jeannette* principle than the *Jeannette* case itself. In *Jeannette*, this Court had decided on the same day that the underlying ordinances drawn in question in that case violated guaranties of freedom of speech, press and religion afforded by the Constitution of the United States. Despite this contemporaneous holding, the Court nevertheless dismissed the Douglas suit in the federal district court on the ground that his remedies had to be pursued through the state courts of Pennsylvania.

Moreover, *Douglas* v. *Jeannette* involved—as this case does not—an alleged abridgement of freedom of speech. This freedom has been accorded, in the opinion of some of the members of this Court, a preferred position among Constitutional guaranties. See *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).[5]

The decision below conflicts also with similar enunciations of the *Jeannette* doctrine in other decisions of this Court.

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mum penalty for violation of the relevant city ordinances is "a fine of not less than one nor more than one hundred dollars, or by imprisonment in jail or at hard labor for a period of not exceeding six months, or by both such fine and imprisonment, at the discretion of the recorder" (Chapter 1, Section 6, Code of the City of Montgomery, 1952). The maximum penalty for violation of the relevant state statutes is a fine of "not more than five hundred dollars for each offense" (Title 48, Section 301 (31a), Code of Alabama, 1940, as amended).

[5] Compare the opinion of Mr. Justice Reed (336 U. S. 77, 88) with the opinion of Mr. Justice Frankfurter (336 U. S. 77, 90).

See e. g. *Stefanelli* v. *Minard,* 342 U. S. 117, 123 (1951):

> "(T)he federal equity power must refrain from staying state prosecutions outright to try the simple question of the validity of the statute on which the prosecution is based. . . ."

See also *Burford* v. *Sun Oil Co.,* 319 U. S. 315, 333, n. 29 (1943):

> "In recent years, this Court has refused to permit the exercise of federal equity jurisdiction to enjoin the enforcement of State criminal statutes."

Of similar import are *Beal* v. *Missouri Pacific R. Co.,* 312 U. S. 45 (1941); *Watson* v. *Buck,* 313 U. S. 387 (1941); *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89 (1935).

2. The Court below should have abstained from exercising jurisdiction in this case because the statutes and ordinances involved concern vastly important areas of state and local administration, and enunciate broad legislative policy in this regard. Appellate review of convictions under these enactments is available in the Alabama state courts.

Most apposite are the recent cases of *Alabama Public Service Commission* v. *Southern Railway,* 341 U. S. 341 (1951) and *Burford* v. *Sun Oil Co.,* 319 U. S. 315 (1943), in which the Court answered affirmatively the question:

> "Assuming that the federal court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?" (341 U. S. at 345)

In *Southern,* the railroad petitioned the Alabama Public Service Commission to discontinue service on certain trains which it was allegedly operating at a loss. Under Alabama law, discontinuance could not be undertaken without permission of the Alabama Commission.

The permission was denied, and Southern, instead of pursuing its remedies in the Alabama courts, sued in the federal district court, alleging diversity of citizenship and the presence of a federal question arising out of its contention that required continuance of operation of the lines at a loss constituted a confiscation of its property in violation of the Fourteenth Amendment of the Constitution of the United States.

A federal district court of three judges assumed jurisdiction and enjoined the Commission from taking any steps to enforce its order, on the ground that confiscation did in fact exist.

This Court reversed the district court, holding that even though that court had jurisdiction, the case was not a proper one for its exercise (341 U. S. 341). This Court commented:

> "Appellee takes the position, adopted by the court below, that whenever a plaintiff can show irreparable loss caused by an allegedly invalid state administrative order ripe for judicial review in the state courts the presence of diversity of citizenship or a federal question opens the federal courts to litigation as to the validity of that order, at least so long as no action involving the same subject matter is actually pending in the state courts. But, it by no means follows from the fact of district court jurisdiction that such jurisdiction must be exercised in this case." (341 U. S. at 344f)

The *Southern* case is a culmination of judicially conceived solutions to the vexing problem of how to limit the authority of lower federal courts where matters predominantly of state concern are at issue. This Court found that equitable intervention in that case to enjoin enforcement of a state administrative order had not exhibited "the scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." (Quoted 341 U. S. at 349) Ordinary rules of comity had to be invoked to avoid useless friction with Alabama administrative policies. And Southern was told to pursue its remedies in the state courts.

It is noteworthy that the *Southern* case did not involve a new or undefined state statute.

The Court below rejected the *Southern* case as inapposite because an alleged deprivation of "constitutional civil rights" was involved, and the federal courts "have a responsibility as heavy as that which rests on the state courts" for the protection of these rights. (Appendix A, p. 9a)

It is respectfully submitted that the court below imposed an unwarranted limitation on the applicability of the *Southern* doctrine. Indeed, this Court has made it perfectly plain that the doctrine does apply to cases arising under the Civil Rights Act. In *Stefanelli* v. *Minard,* 342 U. S. 117, 120 (1951) this Court stated:

> "For even if the power to grant the relief here sought may fairly and constitutionally be derived from the generality of language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion

when, in a matter of equity jurisdiction, the balance is against the wisdom of using their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States.

"We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment. . . . This concern has been reflected in decisions of this Court, not governed by explicit congressional requirement, bearing on a State's enforcement of its criminal law."

While *Stefanelli* apparently combines the underlying considerations of the *Southern* case and of *Douglas* v. *Jeannette*, both considerations are present in the case at bar. The Court below has enjoined the enforcement of state criminal statutes, and has not exercised its equitable discretion in such a manner as to withhold its jurisdiction so that constitutional issues may be tried out in the state courts with ultimate review in this Court.

3. Another basic procedural doctrine presented here —intimately related to the doctrine of the *Southern* case—dictates federal court abstention where the con-

stitutionality of an ill-defined state statute is drawn in question. See *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496 (1941); *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168 (1942); *Spector Motor Company* v. *McLaughlin*, 323 U. S. 101 (1944); and *A. F. of L.* v. *Watson*, 327 U. S. 582 (1946).

The court below declined to apply this doctrine in a case where concededly the statutes and ordinances involved were presently being tested in the state courts in the course of the prosecution of another Negro person.

The doctrine of the *Pullman* case is a judicially devised method of effecting a limited federal stay to permit state adjudication of undecided local questions which might render unnecessary a decision of federal questions. Since there is now a state proceeding, the court below should have declined to exercise jurisdiction of this proceeding pending state court adjudication.

II

The Decision Below Holding That Seperate Accommodations for White and Negro Passengers on Public Buses Violate the Constitution of the United States, Even Though Those Facilities Are Equal, Is in Direct Conflict With Decisions of This Court.

The Court below found that "without dispute the evidence is to the effect that, other than being separate, such accommodations (that is, on public buses), are equal." (Appendix A, p. 5a) Despite such equality, the Court below held that enforcement of separateness violated the constitutional guaranties afforded by the Fourteenth Amendment of the Constitution of the United States.

The holding below conflicts squarely with *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), where this Court held that a Louisiana statute requiring railway companies to provide separate but equal accommodations for white and colored races did not conflict with the Fourteenth Amendment.

The Court below recognized that its decision conflicted with *Plessy* v. *Ferguson*. Its holding was based on supposed indications of this Court in the School Segregation Cases—*Brown* v. *Board of Education*, 347 U. S. 483 (1954) and *Bolling* v. *Sharpe*, 347 U. S. 497 (1954)—that it would no longer follow *Plessy* in any case.

The Court below sought to draw support for its theory from more recent decisions of this Court involving segregation in municipal recreational centers. *Dawson* v. *Baltimore*, 350 U. S. 877 and *Holmes* v. *Atlanta*, 350 U. S. 879.

But this Court very carefully restricted its departure from *Plessy* v. *Ferguson* to the field of public education. It held that "Separate educational facilities are inherently unequal." (*Brown* v. *Board of Education*, 347 U. S. 483, 495)

Moreover, this Court observed that *Plessy* involved "not education but transportation." (*Brown* v. *Board of Education*, 347 U. S. 483, 491)

Surely if this Court in the School Segregation Cases had intended to deny to *Plessy* any further judicial efficacy it would have said so in no uncertain terms.[6]

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[6] When this Court has overruled decisions in the past, it has done so most explicitly. See *Murdock* v. *Pennsylvania*, 319 U. S. 105, 117: "The judgment in *Jones* v. *Opelika* has this day been

The intangible factors which this Court considered most relevant in the School Segregation Cases, are not present with equal force in this case. Moreover, certainly in so mundane a field as public transportation, if a State provides equal physical facilities and equality in other tangible factors, it should be left to its own devices so far as police power and legislation are concerned. For this reason, it is submitted, this Court saw fit to leave *Plessy* its continued vigor in the field of intrastate transportation.

A substantial question regarding the continued efficacy of *Plessy* is involved in the decision below. Moreover, the court below reached a wrong conclusion on this question.

It is submitted that the decision of the district court below is in error as pointed out, and that the questions presented by this appeal are substantial and are of great public importance.

Respectfully submitted,

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vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate their religious beliefs and the tenets of their faith through distribution of literature."

See also, *Erie RR Co.* v. *Tompkins*, 304 U. S. 64, 69 (1938): "The question for decision is whether the oft challenged doctrine of *Swift* v. *Tyson* shall now be disapproved." This Court decided that it should be.

I certify that I have served a copy of the foregoing jurisdictional statement upon Messrs. Fred D. Gray and Charles D. Langford, attorneys for appellees, by depositing the same in a United States Post Office with first-class postage prepaid addressed to them at 131½ Monroe Street, Montgomery, Alabama.

.....

WALTER J. KNABE.

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

No. 1147

AURELIA S. BROWDER, and SUSIE McDONALD and CLAUDETTE COLVIN, by Q. P. Colvin, next friend, and MARY LOUISE SMITH, by Frank Smith, next friend, and others similarly situated,

Plaintiffs,

vs.

W. A. GAYLE, CLYDE SELLERS and FRANK PARKS, individually and as members of the Board of Commissioners of the City of Montgomery, Alabama, and GOODWYN J. RUPPENTHAL, individually and as Chief of Police of the City of Montgomery, Alabama, and THE MONTGOMERY CITY LINES, INC., a Corporation, and JAMES F. BLAKE, and ROBERT CLEERE, and C. C. (JACK) OWEN, JIMMY HITCHCOCK, and SIBYL POOL, as members of the ALABAMA PUBLIC SERVICE COMMISSION,

Defendants.

Before RIVES, *Circuit Judge*, and LYNNE and JOHNSON, *District Judges:*

RIVES, *Circuit Judge:*

Statement of the Case

The purpose of this action is to test the constitutionality of both the statutes of the State of Alabama [1] and the ordi-

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[1] Title 48, § 301 (31a,b,c), Code of Alabama of 1940, as amended, which provide:

"Sec. 301(31a). Separate accommodations for white and colored races.—All passenger stations in this state operated by any motor transportation company shall have separate waiting rooms or space and separate ticket windows for the white and colored races, but such accommodations for the races shall be equal. All motor transportation companies or operators of vehicles carrying passengers for hire in this state, whether intrastate or interstate passengers, shall at all times provide equal but separate accommodations on each vehicle for the white and colored races. The conductor or agent of the motor transportation company in charge of any vehicle is authorized and required to assign each passenger to the division of the vehicle designated for the race to which the passenger belongs; and, if the passenger refuses to occupy the division to which he is assigned, the conductor or agent may refuse to carry the passenger on the vehicle; and, for such refusal, neither the conductor or agent of the motor transportation company nor the motor transportation company shall be liable in damages. Any motor transportation company or person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than five hundred dollars for each offense; and each day's violation of this section shall constitute a separate offense.

"The provisions of this section shall be administered and enforced by the Alabama public service commission in the manner in which provisions of the Alabama Motor Carrier Act of 1939 are administered and enforced. (1945, p. 731, appvd. July 6, 1945.)

"Sec. 301(31b). Operators of passenger stations and carriers authorized to segregate white and colored races.—All passenger stations in this state operated by or for the use of any motor transportation company shall be authorized to provide separate waiting rooms, facilities, or space, or separate ticket windows, for the white and colored races but such accommodations for the races shall be equal. All motor transportation companies and operators of vehicles, carrying passengers for hire in this state, whether intrastate or interstate passengers, are authorized and empowered to provide separate accommodations on each vehicle for the white and colored races. Any officer or agent of such motor transportation company or operator, in charge of any vehicle, is authorized to assign or reassign each pasenger or person to a division, section or seat on the vehicle designated by such company or operator, or by such officer or agent, for the race to which the passenger or person belongs; and if the passenger or person refuses to occupy the division, section or seat to which he is so assigned, such officer or agent may refuse further to carry the passenger on the vehicle.

nances of the City of Montgomery [2] which require the segregation of the white and colored races on the motor buses of the Montgomery City Lines, Inc., a common carrier of passengers in said City and its police jurisdiction.

For such refusal neither the officer nor agent, nor the motor transportation company, nor operator, shall be liable in damages. (1947, p. 40, § 1, appvd. July 18, 1947.)

"Sec. 301(31c). Failure to comply with rules and regulations as to segregation of white and colored races.—It shall be unlawful for any person willfully to refuse or fail to comply with any reasonable rule, regulation, or directive of any operator of a passenger station in this state operated by or for the use of any such motor transportation company, or of any authorized officer or agent of such operator, providing separate waiting rooms, facilities, or space, or separate ticket windows, for white and colored races; or willfully to refuse or fail to comply with any reasonable assignment or reassignment by any officer or agent in charge of any vehicle of any such motor transportation company or of any operator of vehicles carrying passengers for hire, of any passenger or person to a division, section, or seat on such vehicle designated by such officer or agent for the race to which such passenger or person belongs; any person so refusing or failing to comply with any such reasonable rule, regulation, or assignment, as aforesaid, shall be guilty of a misdemeanor and upon conviction shall be fined not more than $500.00 for such offense. (1947, p. 40, § 2, appvd. July 18, 1947.)"

[2] Section 10, Chapter 6, Code of the City of Montgomery, 1952, which provides:

"Every person operating a bus line in the city shall provide equal but separate accommodations for white people and negroes on his buses, by requiring the employees in charge thereof to assign passengers seats on the vehicles under their charge in such manner as to separate the white people from the negroes, where there are both white and negroes on the same car; provided, however, that negro nurses having in charge white children or sick or infirm white persons, may be assigned seats among white people.

"Nothing in this section shall be construed as prohibiting the operators of such bus lines from separating the races by means of separate vehicles if they see fit."

Section 11 of Chapter 6, Montgomery City Code of 1952, further provides:

"Any employee in charge of a bus operated in the city shall have the powers of a police officer of the city while in actual charge of any bus, for the purpose of carrying out the provisions of the preceding section, and it shall be unlawful for any passenger to refuse or fail to take a seat among those assigned to the race to which he belongs, at the request of any such employee in charge, if there is such a seat vacant."

The plaintiffs are four Negro citizens who bring this action for themselves and on behalf of all other Negroes similarly situated.[3] The defendants are the members of the Board of Commissioners and the Chief of Police of the City of Montgomery, the members of the Alabama Public Service Commission, The Montgomery City Lines, Inc., and two of its employee drivers.

Each of the four named plaintiffs has either been required by a bus driver or by the police to comply with said segregation laws or has been arrested and fined for her refusal so to do. The plaintiffs, along with most other Negro citizens of the City of Montgomery, have since December 5, 1955, and up to the present time, refrained from making use of the transportation facilities provided by Montgomery City Lines, Inc. Plaintiffs and other Negroes desire and intend to resume the use of said buses if and when they can do so on a non-segregated basis without fear of arrest.

The members of the Board of Commissioners and the Chief of Police of the City of Montgomery in their answers to the complaint admit "that they seek to enforce the statutes of the State of Alabama and the ordinances of the City of Montgomery, Alabama", and further aver that "segregation of privately owned buses within cities within the State of Alabama is in accordance with the laws of the State of Alabama and the City of Montgomery."

The members of the Alabama Public Service Commission deny that they, in their official capacities as such members have any jurisdiction over, or have issued any orders relating to the separation of the races on buses operated wholly within the City of Montgomery and its police jurisdiction. On information and belief they allege that the members of the Board of Commissioners and the Chief of Police of said City "have sought to enforce by legal means

[3] Rule 23(a), F. R. C. P.

constitutional and valid statutes and ordinances providing for separate but equal seating arrangements on buses operated in the City of Montgomery, Alabama, and its police jurisdiction".

The Montgomery City Lines, Inc., admits that it has operated, and pursuant to orders of a State Court, continues to operate "its buses as required by the Statutes and Ordinances set out in the Complaint requiring it to provide equal but separate accommodations for the white and colored races". Without dispute the evidence is to the effect that, other than being separate, such accommodations are equal.

The defendants, Blake and Cleere, admit they are employees of the Montgomery City Lines and drivers of its buses, that as such they have acted pursuant to orders of said Company which "has operated its buses on the basis of racial segregation as required by said statutes and ordinances". They deny that as drivers of said buses they are exercising the powers of police officers in the enforcement of said statutes and ordinances.

The complaint prays for the convening of a three-judge district court as provided by Title 28 of the United States Code, § 2284; for a declaratory judgment as to whether the enforcement of said statutes and ordinances abridges the privileges and immunities of plaintiffs as citizens of the United States, or deprives them of liberty without due process of law, or denies to them the equal protection of the law, as secured by the Fourteenth Amendment to the Constitution of the United States,[4] and the rights and privileges

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[4] Fourteenth Amendment, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

secured to them by Title 42, United States Code, §§ 1981 and 1983.[5] The complaint further prays that the defendants be both temporarily and permanently enjoined from enforcing the statutes and ordinances claimed to be unconstitutional and in conflict with said Federal statutes.

FEDERAL JURISDICTION

Federal jurisdiction is invoked under Title 28, United States Code, §§ 1331 and 1343 (3),[6] and under Title 42, United States Code, §§ 1981 and 1983, footnote 5, *supra*. We think that the validity of both the State statutes and the City ordinances is in questtion, but if only the City ordinances are involved, Federal jurisdiction would still

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[5] "Section 1981. Equal rights under the law.

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the securtiy of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"Section 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, but in equity, or other proper proceeding for redress."

[6] "Section 1331. Federal question; amount in controversy.

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

"Section 1343. Civil rights.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

exist because the Constitution and statutes of Alabama authorize the adoption of City ordinances "not inconsistent with the laws of the State",[7] and because the constitutional phrase "equal protection of the laws" refers to City ordinances adopted under State authority as well as to State statutes.[8]

JURISDICTION OF THREE-JUDGE DISTRICT COURT

A three judge district court is required for the granting of "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State". (22 U. S. C. A. 2281.) According to the complaint and the answers, the separation of the races on the buses is required both by State statutes and by City ordinances. Admittedly, therefore, State statutes are involved. The defendants claim, however, that the statutes and ordinances are being enforced by municipal officers only, and not by "any officer of such State". (28 U. S. C. A. 2281, *supra.*)

If the members of the Alabama Public Service Commission are proper parties defendant, a matter to be hereinafter discussed, then it must be conceded that the objection to the jurisdiction of the three judge district court fails. Irrespective of the answer to that question, however, we think that the three judge district court has jurisdiction.

The State statutes, footnote 1, *supra*, vest in the defendant bus drivers the authority to enforce, and, notwithstanding their insistence to the contrary, we think that when so engaged the bus drivers clearly are officers of the State.

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[7] Constitution of Alabama of 1901, § 89; Alabama Code of 1940, Title 37, § 455.

[8] *Buchanan* v. *Warley*, 245 U. S. 60; *Cf.* 42 U. S. C. A. 1983; *Carlson* v. *People of California*, 310 U. S. 106; *Lovell* v. *City of Griffin*, 303 U. S. 444; *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306; *El Paso* v. *Texas Cities Gas Co.*, 5th Cir., 100 F. 2d 501.

The City Commissioners have important duties to perform in connection with the enforcement, operation, and execution of State statutes. Under Alabama law, a municipal corporation "is essentially a public agency, a local unit of government, invested with a portion of the sovereign power of the State, for the benefit of its inhabitants." *Cooper* v. *Town of Valley Head*, 212 Ala. 125; 101 So. 874, 875. The defendant Chief of Police has authority to make arrests for violation of State statutes, 1940 Code of Alabama, Title 15, § 152. The City Recorder in criminal cases has the power of an ex-officio justice of the peace. 1940 Code of Alabama, Title 37, § 585. All of the City officials admit in their answers that they are enforcing the State statutes. An official, though localized by his geographic activities and the mode of his selection, is performing a State function when he enforces a statute which "embodies a policy of statewide concern."[9]

Very clearly, the three judge district court has jurisdiction.[10]

COMITY

The defendants, relying on *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, insist that even if the Federal court has jurisdiction, it should, in its discretion as a court of equity, and for reasons of comity, decline to exercise such jurisdiction until the State courts have ruled on the construction and validity of the statutes and ordinances. The short answer is that that doctrine has

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[9] *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Rorick* v. *Commissioners*, 307 U. S. 208, 212; *Cleveland* v. *United States*, 323 U. S. 329, 332; *Watch Tower Bible & Tract Society* v. *Bristol*, D. Ct. Conn., 24 F. S. 57, affirmed 305 U. S. 572; *Suncrest Lumber Co.* v. *N. C. Park Commission*, 4th Cir., 29 F. 2d 823.

[10] If, however, the proceedings were not such as to require the presence of three judges, the judgment would still be valid as the act of the court of one judge, since that judge concurs and joins in the rendition of the judgment. *Commission* v. *Brasher Lines*, 312 U. S. 621, 626; *O'Malley* v. *U. S.*, 8th Cir., 128 F. 2d 676, 687.

no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts.[11]

PARTIES

Without repeating the averments of the complaint we hold that they are clearly sufficient to constitute this a class action on behalf of the four individual plaintiffs and of all other Negro citizens similarly situated. See Rule 23 (a), F. R. C. P.

It was probably not necessary for the plaintiffs to sue the members of the Board of Commissioners and the Chief of Police, not only as such but also individually, when no relief is sought against them by way of damages. If, however, the plaintiffs' contentions are sustained, these defendants are acting not only in their capacities as municipal officers, but also as officers of the State; and, further, are possibly transcending the scope of their office in any capacity when they compel obedience to statutes and ordinances attacked as unconstitutional. Moreover, in issuing and enforcing an injunction, a court of equity acts in personam. If, as we trust will be true, no relief becomes necessary against any of them in their individual capacities, their joinder as individuals will prove harmless. The motion to strike said parties in their individual capacities is therefore denied.

The members of the Alabama Public Service Commission object to their joinder as parties defendant and move to dismiss the action as against them because they say that neither they nor the Commission have any jurisdiction

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[11] *Lane* v. *Wilson*, 307 U. S. 268, 274; *Mitchell* v. *Wright*, 5th Cir., 154 F. 2d 924, 926; *Romero* v. *Weakley*, 9th Cir., 226 F. 2d 399, 402; *Wilson* v. *Beebe*, Dis. Ct. Del., 99 F. S. 418, 420. *Cf. Doud* v. *Hodge*, 350 U. S. 485, 487.

over the buses which are being operated within the City of Montgomery and its police jurisdiction.[12]

In the Act approved July 6, 1945, General Acts of Alabama 1945, p. 731, now carried into the pocket supplement of the 1940 Code of Alabama as Title 48, § 31(a), see footnote 1, *supra*, appears the following significant paragraph: "The provisions of this section shall be administered and enforced by the Alabama Public Service Commission in the manner in which provisions of the Alabama Motor Carrier Act of 1939 are administered and enforced."

Testifying as a witness, the President of the Alabama Public Service Commission admitted that on April 24, 1956, he sent a telegram to the National City Lines of Chicago, of which the Montgomery City Lines, Inc., is a subsidiary, reading as follows:

> "As President of the Alabama Public Service Commission, elected by the people of Alabama, sworn to uphold the segregation laws of this state, which include all forms of public transportation, I hereby defy ruling handed down by the United States Supreme Court ordering desegregation on public carriers. Alabama state law requiring segregation of the races on buses still stands. All public carriers in Alabama are hereby directed to strictly adhere to all present existing segregation laws in our state or suffer the consequences.
>
> /s/ C. C. (Jack) Owen, *President, Alabama Public Service.*"

That telegram was sent without the knowledge or concurrence of the other two Commissioners.

Since the 1945 Act expressly imposes on the Alabama Public Service Commission the duty of administering and enforcing its requirements as to segregation of the races, and since the President of the Commission has acted so

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[12] Compare Code of Alabama 1940, Title 48, § 239 with § 2 of the Alabama Motor Carrier Act of 1939 carried into the pocket supplement of the Alabama Code as Title 48, § 301(2).

positively and affirmatively to that end, the motion to dismiss the action as against the members of the Alabama Public Service Commission should be and the same is hereby denied.[13]

Validity of Separate But Equal Doctrine As Applied to Intrastate Transportation

The ultimate question is whether the statutes and ordinances requiring the segregation of the white and colored races on the common carrier motor buses in the City of Montgomery and its police jurisdiction are unconstitutional and invalid. Unless prohibited by the Constitution of the United States, the power to require such segregation is reserved to the States or to the people. See Tenth Amendment.

In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U. S. 3. Indeed, we think that such liberty is guaranteed by the due process clause of that Amendment.

There is, however, a difference, a constitutional difference, between voluntary adherence to custom and the perpetuation and enforcement of that custom by law. *Shelley* v. *Kraemer*, 334 U. S. 1, 13. The Fourteenth Amendment provides that "No State shall * * * deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Those provisions do not interfere with the police power of the States so long as the state laws operate alike upon

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[13] If, in law and fact, the Commission has no jurisdiction over the operation of the buses here involved, the retention of the members of the Commission as parties defendant will be harmless to them, even if erroneous.

all persons and property similarly situated. *Barbier* v. *Connolly*, 113 U. S. 27, 31, 32. That Amendment "merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Marchant* v. *Penn. Railroad*, 153 U. S. 380, 390. The equal protection clause requires equality of treatment before the law for all persons without regard to race or color. See e.g. *Strauder* v. *West Virginia*, 100 U. S. 303; *Buchanan* v. *Warley*, 245 U. S. 60; *Gong Lum* v. *Rice*, 275 U. S. 78; *Shelley* v. *Kraemer*, 334 U. S. 1.

In *Plessy* v. *Ferguson*, 163 U. S. 537, decided in 1896, the Supreme Court held as to intrastate commerce that a Louisiana statute requiring railway companies to provide equal but separate accommodations for the white and colored races was not in conflict with the provisions of the Fourteenth Amendment. That holding was repeatedly followed in later cases. *Chesapeake and Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388 (1900); *Chiles* v. *Chesapeake & Ohio Ry. Co.*, 218 U. S. 71 (1910); *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S 151 (1914).

In *Morgan* v. *Virginia*, 328 U. S. 373 (1946), the Court held that a state statute requiring segregated seats for Negro passengers on interstate buses was an unconstitutional burden on interstate commerce. In *Henderson* v. *United States*, 339 U. S. 816 (1950) the Court held that interstate railroad regulations and practices assigning a separate table in a dining car to Negroes contravened the Interstate Commerce Act. The Court referred to the statutory right as "a fundamental right of equality of treatment", and cited cases construing the Fourteenth Amendment, see 339 U. S. 825, though the Court did not reach the constitutional question. The reasoning applied was similar to that employed in *Shelley* v. *Kraemer*, 324 U. S. 1, 22, where the Court recognized that the underlying philosophy of the Fourteenth Amendment is the equality before the law of each individual.

In the field of college education, beginning in 1938 and continuing to the present time, the Court has first weakened the vitality of, and has then destroyed, the separate but equal concept. *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents of Univ. of Oklahoma*, 338 U. S. 631 (1948); *Fisher* v. *Hurst*, 333 U. S. 147 (1948); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950); *Hawkins* v. *Board of Control of University of Florida*, 347 U. S. 971 (1954); *Tureaud* v. *Board of Supervisors of L. S. U.*, 347 U. S. 971 (1954); *Lucy* v. *Adams*, 350 U. S. 1 (1955); *Florida ex rel. Hawkins* v. *The Board of Control*, 350 U. S. 413; *Board of Trustees of the University of N. C.* v. *Frasier*, 350 U. S. 979 (1956).

The separate but equal concept had its birth prior to the adoption of the Fourteenth Amendment in the decision of a Massachusetts State court relating to public schools. *Roberts* v. *City of Boston*, 59 Mass. (5 Cush) 198 (1849). The doctrine of that case was followed in *Plessy* v. *Ferguson, supra.* In the School Segregation cases, *Brown* v. *Board of Education*, 347 U. S. 483 (1954) and *Rollins* v. *Sharpe*, 347 U. S. 497 (1954) the separate but equal doctrine was repudiated in the area where it first developed, *i.e.*, in the field of public education. On the same day the Supreme Court made clear that its ruling was not limited to that field when it remanded "for consideration in the light of the Segregation cases * * * and conditions that now prevail" a case involving the rights of Negroes to use the recreational facilities of city parks. *Muir* v. *Louisville Park Theatrical Association*, 347 U. S. 971 (1954).

Later the Fourth Circuit expressly repudiated the separate but equal doctrine as applied to recreational centers. *Dawson* v. *Mayor and City of Baltimore*, 4th Cir., 220 F. 2d 386, 387. Its judgment was affirmed by the Supreme Court, 350 U. S. 877. The doctrine has further been repudiated in holdings that the cities of Atlanta and of Miami

cannot meet the test by furnishing the facilities of their municipal golf courses to Negroes on a segregated basis. *Rice* v. *Arnold*, 340 U. S. 848; *Holmes* v. *City of Atlanta*, 350 U. S. 879.

Even a statute can be repealed by implication. A *fortiori*, a judicial decision, which is simply evidence of the law and not the law itself, may be so impaired by later decisions as no longer to furnish any reliable evidence.[14]

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[14] This principle is aptly illustrated by the difference with which the Fourth Circuit treated *Plessy* v. *Ferguson* as a binding precedent in 1950, *Boyer* v. *Garrett*, 183 F. 2d 582 and in 1955, *Flemming* v. *South Carolina Electric & Gas Co.*, 224 F. 2d 752. In their change of views that distinguished Court headed by Chief Judge Parker was governed by the rule best stated by Judge Parker himself, speaking for a three judge district court in *Barnette* v. *West Virginia State Board of Education*, 47 F. S. 251, 252-3:

"Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in *Jones* v. *City of Opelika*, 316 U. S. 584, 62 S. Ct. 1231, 1251, 86 L. Ed. 1691. The majority of the court in *Jones* v. *City of Opelika*, moreover, thought it worth while to distinguish the decision in the *Gobitis* case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the kag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of these protected by constitutional guaranties."

To like effect is the opinion of Judge Frank for the Second Circuit in *Perkins* v. *Endicott Johnson Corporation*, 128 F. 2d 208, 217-218:

"We would stultify ourselves and unnecessarily burden the Supreme Court if—adhering to the dogma, obviously fictional to any

We cannot in good conscience perform our duty as judges by blindly following the precedent of *Plessy* v. *Ferguson, supra*, when our study leaves us in complete agreement with the Fourth Circuit's opinion[15] in *Flemming* v. *South Carolina Electric and Gas Co.*, 224 F. 2d 752, appeal dismissed April 24, 1956, ____ U. S. ____, that the separate but equal doctrine can no longer be safely followed as a correct statement of the law. In fact, we think that *Plessy* v. *Ferguson* has been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation within the City of Montgomery and its police jurisdiction. The application of that doctrine cannot be justified as a proper execution of the state police power.[16]

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reader of its history, that alterations in that court's principles of decision never occur unless recored in explicit statements that earlier decisions are overruled—we stubbornly and literally followed decisions which have been, but not too obstentatiously, modified. 'The life of the law,' as Mr. Justice Holmes said, 'has been experience.' Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." See, also *United States* v. *Girouard*, 1st Cir., 149 F. 2d 760, 765, dissenting opinion of Judge Woodbury, reversed 328 U. S. 6; *New Eng. Mutl. Life Ins. Co.* v. *Welch*, 1st Cir., 153 F. 2d 260, 262; *Picard* v. *United Aircraft Corp.*, 128 F. S. 632, 636; opinion by Judge *Learned Hand; Spector Motor Service* v. *Walsh*, 2nd Cir., 139 F. S. 809, 814, opinion by Circuit Judge Clark; *Gardella* v. *Chandler*, 2nd Cir., 172 F. 2d 402, 409; *United States* v. *Ullum*, 2d Cir., 221 F. 2d 760, 762; "The Attitude of Lower Courts to Changing Precedents", 50 Yale L. J. 1448.

[15] That opinion is entitled to great respect, especially in view of the distinction and learning of the judges who compose that Court, Circuit Judges Parger, Soper and Bobie.

[16] *Shelley* vs. *Kraemer*, 334 U. S. 1, 21; *Morgan* vs. *Virginia*, 328 U. S. 373, 380; *Buchanan* vs. *Warley*, 245 U. S. 60, 74; *City of Birmingham* vs. *Monk*, 5th Cir., 185 F. 2d 859, 862.

We hold that the statutes and ordinances requiring segregation of the white and colored races on the motor buses of a common carrier of passengers in the City of Montgomery and its police jurisdiction violate the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States. This holding does not, however, become effective until the entry of formal judgment. The parties are requested to submit to the Court in writing within two weeks from the date of this opinion their views as to the form of judgment to be entered, and as to whether such judgment should be stayed in the event of an appeal.

This the 5th day of June, 1956.

RICHARD T. RIVES,
United States Circuit Judge.

EDWARD JOHNSON, JR.,
United States District Judge.

LYNNE, *District Judge*, dissenting:

Only a profound, philosophical disagreement with the ultimate conclusion of the majority "that the separate but equal doctrine can no longer be safely followed as a correct statement of the law" would prompt this, my first dissent. But I should consider myself recreant both to conscience and duty in withholding my views because of the affection and esteem which I bear for my associates.

For many years as a trial judge in the state and federal systems I have endeavored faithfully to understand and apply precedents established by the opinions of appellate courts. This was not a blind obedience to a legalistic formula embodied in the rule of *stare decisis*. It was the result of a simple belief that the laws which regulate the conduct, the affairs, and sometimes the emotions of our people should evidence not only the appearance but also the spirit of stability.

Judges of trial courts frequently find themselves in disagreement with the rationale of an old, but clearly controlling precedent. That is so because their positions do not insulate them from those changing physical and metaphysical concepts which form a part of the life process. But they are neither designed nor equipped to perform the legislative function of putting off the old and putting on the new. To arrogate to themselves this prerogative, in my humble opinion, would be the first, fatal step in making hollow the proud boast that ours is a 'government of laws and not of men.''

Judges Rives, just the other day, delivering the opinion of the Court of Appeals for the Fifth Circuit, sitting *en banc*, in *Howard* v. *United States*, ____ F. 2d ____ (April 20, 1956), stated my position, clearly and concisely:

> "In the face of such recognition by the Supreme Court of a test of criminal responsibility, we do not feel at liberty to consider and decide whether in our opinion the recent modification of such test in the District of Columbia is sound or unsound, nor whether some other test should be adopted. *This Circuit follows the law as stated by the Supreme Court and leaves any need for modification thereof to that court*, . . ." (Emphasis supplied.)

The majority recognize, it was conceded in oral arguments by counsel for plaintiffs, that *Plessy* v. *Ferguson*, 163 U. S. 537 (1896) is precisely in point, and that its holding has been repeatedly followed in later transportation cases.[1] Its authority obviously was unaffected by the action of the Supreme Court in dismissing the appeal in *South Carolina Electric & Gas Co.* v. *Flemming*, ____ U. S. ____, 24 L. W. 3280. The citation of *Slaker* v. *O'Connor*, 278 U. S. 188, is convincing that it did not place the stamp of its approval upon the decision of the Fourth Circuit in

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[1] *Chesapeake & Ohio Ry. Co.* v. *Kentucky*, 179 U. S. 388 (1900); *Chiles* v. *Chesapeake & Ohio Ry. Co.*, 218 U. S. 71 (1910); *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151 (1914).

Flemming v. *South Carolina Electric & Gas Co.*, 224 F. 2d 752, but simply concluded that its judgment was not final and hence that the appeal did not lie. 28 U. S. C. A. 1254(2).

In complete agreement with the Fourth Circuit's opinion in *Fleming* that the separate but equal doctrine can no longer be safely followed as a correct statement of the law, the majority conclude that *Plessy* v. *Ferguson*, in which that doctrine made its first appearance sixty years ago, has been impliedly, though not explicitly overruled. While I share their great respect for Judges Parker, Soper and Dobie, I do not at all agree.

A comparatively new principle of pernicious implications has found is way into our jurisprudence.[2] Lower courts may feel free to disregard the precise precedent of a Supreme Court opinion if they perceive a "pronounced new doctrinal trend" in its later decisions which would influence a cautious judge to prophesy that in due time and in a proper case such established precedent will be overturned explicitly. Peculiarly appropriate in this context is the following language of Judge Woodbury, writing for the First Circuit in *New England Mutual Life Ins. Co.* v. *Welch*, 153 F. 2d 260, 262:

> "Furthermore we find no indication from anything said therein of a purpose to depart from the rule of the earlier decisions cited above. Under these circumstances we see no occasion even to consider the basic question whether we would adopt the doctrine of Barnette v. West Virginia State Board of Education, D. C. 47 F. Supp. 251, 253, and Spector Motor Service v. Walsh, 2 Cir., 139 F. 2d 809, 817, 823, and in extraordinary situations disregard controlling decisions of the

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[2] *Baraclle* v. *West Virginia State Board of Education*, 47 F. Supp. 251 (1942); *Perkins* v. *Endicott Johnson Corporation*, 128 F. 2d 208 (1942); *Spector Motor Service* v. *Walsh*, 139 F. 2d 809 (1943); *Gardella* v. *Chandler*, 172 F. 2d 402, 409 (1949); *United States* v. *Ullmann*, 221 F. 2d 760 (1955); *United States* v. *Girouard*, 149 F. 2d 760 (1945); 50 Yale Law Journal 1448.

> Supreme Court not yet explicitly overruled. It will suffice to say that we would feel disposed to consider taking such a course only when there are the clearest indications that the controlling decisions of the Supreme Court, though not formally overruled, would no longer be followed by that Court and we find no such indications here."

In 1950, the Fourth Circuit had before it the case of *Boyer, et al.* v. *Garrett, et al.*, 183 F. 2d 582, involving an officially adopted rule providing for the segregation of races in athletic activities in the public parks and playgrounds in the City of Baltimore. In affirming the judgment of the District Court, the same judges who decided *Flemming* held:

> "The contention of plaintiffs is that, notwithstanding this equality of treatment, the rule providing for segregation is violative of the provisions of the federal Constitution. The District Court dismissed the complaint on the authority of Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; and the principal argument made on appeal is that the authority of Plessy v. Ferguson has been so weakened by subsequent decisions that we should no longer consider it as binding. We do not think, however, that we are at liberty thus to disregard a decision of the Supreme Court which that court has not seen fit to overrule and which it expressly refrained from reexamining, although urged to do so, in the very recent case of Sweatt v. Painter, 70 S. Ct. 848. It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded."

In 1955, in *Flemming*, an intrastate transportation case, reversing the district judge, the court wrote:

> "We do not think that the separate but equal doctrine of Plessy v. Ferguson, supra, can any longer be regarded as a correct statement of the law. That case recognizes segregation of the races by common carriers as being governed by the same principles as segregation in the public schools; and the recent decisions in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct.

686, 98 L. Ed. 873 and Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884, which relate to public schools, leave no doubt that the separate but equal doctrine approved in Plessy v. Ferguson has been repudiated. That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of Henderson v. United States, 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. 1302, where segregation in dining cars was held violative of a section of the Interstate commerce act providing against discrimination."

Within this five year interval the Supreme Court had spoken pertinently but once, in the case of *Brown* v. *Board of Education*, 347 U. S. 483, since *Bolling* v. *Sharpe*, 347 U. S. 497, did not discuss *Plessy* v. *Ferguson* and appears to have been decided on a parity of reasoning. My study of *Brown* has convinced me that it left unimpaired the "separate but equal" doctrine in a local transportation case and I perceive no pronounced new doctrinal trend therein.

Of course I appreciate the care with which the Supreme Court limits its pronouncements upon great constitutional questions to the narrow issues before it and the only issue in *Brown* involved a collision between the Fourteenth Amendment and state laws commanding segregation in the public schools. But in *Brown* the Court's opinion referred to *Plessy* v. *Ferguson* six times and to its "separate but equal" doctrine on four occasions. It epitomized its concept of that doctrine as follows: "Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate." Its ultimate conclusion was, and this I conceive to be the rationale of its decision, "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

It seems to me that the Supreme Court therein recognized that there still remains an area within our constitu-

tional scheme of state and federal governments wherein that doctrine may be applied even though its applications are always constitutionally suspect and for sixty years it may have been more honored in the breach than in the observance. Granted that the trend of its opinions is to the effect that segregation is not to be permitted in public facilities furnished by the state itself and the moneys of the state, as in the case of public schools, or public parks, *cf. Muir* v. *Louisville Park Theatrical Association*, 347 U. S. 971; *Dawson* v. *Mayor and City of Baltimore*, 220 F. 2d 386, affirmed 350 U. S. 877, or municipal golf courses, *cf. Rice* v. *Arnold*, 340 U. S. 848; *Holmes* v. *City of Atlanta*, 350 U. S. 879, on the plain theory that if the state is going to provide such facilities at all, it must provide them equally to the citizens, it does not follow that it may not be permitted in public utilities holding nonexclusive franchises.

If that doctrine has any vitality, this is such a case in which it has been applied fairly. According to its teaching not absolute, but substantial equality is required. Such equality is not a question of dogma, but one of fact. Under the undisputed evidence adduced upon the hearing before us practices under the laws here attacked have resulted in providing the races not only substantially equal but in truth identical facilities.

In my opinion the holding of the Court in *Morgan* v. *Virginia*, 328 U. S. 373, that the attempt of a state to require the segregation of passengers on interstate busses results in the imposition of an undue burden on interstate commerce is wholly irrelevant to the issue before us. And equally inapposite is reference to *Henderson* v. *United States*, 339 U. S. 816, which held that rules and practices of interstate railroad carriers requiring the segregation of passengers in dining cars were offensive to Section 3(1) of the Interstate Commerce Act making it unlawful for a railroad in interstate commerce "to subject any particular

person, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . ."

The supremacy of the federal government in matters affecting interstate commerce is axiomatic. Cases involving the exercise of its power in that realm shed no light on Fourteenth Amendment problems. It does seem quite clear that by its terms the Congress is given the power and duty to enforce the Fourteenth Amendment by legislation. Thus the Congress would have the power, thus derived, to proscribe segregation in intrastate transportation. It is worthy of note that for sixty years it has not seen fit to do so.

While any student of history knows that under our system of government vindication of the constitutional rights of the individual is not, and ought not to be, entrusted to the Congress, its reticence to intrude upon the internal affairs of the several states should caution us against doing so where the path of duty is not plainly marked and when we must hold a clear precedent of the Supreme Court outmoded.

Because I would dismiss the action on the authority of *Plessy* v. *Ferguson*, I do not reach the procedural questions discussed in the majority opinion. I respectfully dissent.

SEYBOURN H. LYNNE,
United States District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

No. 1147

AURELIA S. BROWDER, and SUSIE McDONALD and CLAUDETTE COLVIN, by Q. P. Colvin, next friend, and MARY LOUISE SMITH, by Frank Smith, next friend, and others similarly situated,

Plaintiffs,

vs.

W. A. GAYLE, CLYDE SELLERS and FRANK PARKS, individually and as members of the Board of Commissioners of the City of Montgomery, Alabama, and GOODWYN J. RUPPENTHAL, individually and as Chief of Police of the City of Montgomery, Alabama, and THE MONTGOMERY CITY LINES, INC., a Corporation, and JAMES F. BLAKE, and ROBERT CLEERE, and C. C. (JACK) OWEN, JIMMY HITCHCOCK, and SIBYL POOL, as members of the ALABAMA PUBLIC SERVICE COMMISSION,

Defendants.

(Filed, June 19, 1956, R. C. Dobson, Clerk)

JUDGMENT

This cause came on to be heard before a three-judge court duly convened pursuant to the provisions of Title 28, United States Code, Sections 2281 and 2284.

After trial on the merits and careful consideration of the evidence therein adduced and after oral arguments and submission of briefs by all parties, the Court, being fully advised in the premises, found in an opinion handed down on June 5, 1956, that the enforced segregation of Negro and white passengers on motor buses operating in the City of Montgomery as required by Section 301 (31a, 31b and 31c) of Title 48, Code of Alabama, 1940, as amended, and Sections 10 and 11 of Chapter 6 of the Code of the City

of Montgomery, 1952, violates the Constitution and laws of the United States.

Now, in accordance with that opinion, it is Ordered, Adjudged and Decreed that Section 301 (31a, 31b and 31c) of Title 48, Code of Alabama, 1940, as amended, and Sections 10 and 11 of Chapter 6 of the Code of the City of Montgomery, 1952, are unconstitutional and void in that they deny and deprive plaintiffs and other Negro citizens similarly situated of the equal protection of the laws and due process of law secured by the Fourteenth Amendment to the Constitution of the United States and rights and privileges secured by Title 42, United States Code, Sections 1981 and 1983.

It is further Ordered, Adjudged and Decreed that the defandants, their successors in office, assigns, agents, servants, employees, and persons acting on their behalf, be and they are hereby permanently enjoined and restrained from enforcing the aforesaid statutes and ordinances or any other statutes or ordinances which may require plaintiffs or any other Negroes similarly situated to submit to segregation in the use of the bus transportational facilities in the City of Montgomery, and from doing any acts or taking any action to require the Montgomery Bus Lines, Inc., or its drivers, or any other public bus transportation facility, or its drivers, to enforce such statutes or ordinances requiring the segregation of white and Negro passengers in the operation of public motor bus transportation facilities in the City of Montgomery.

Costs are taxed against defendants.

The injunction granted by this judgment is suspended for a period of ten days from the date hereof, and in the event an appeal is taken from this judgment within such period, such injunction will be further suspended until an additional order can be entered suspending such injunction during the pendency of such appeal.

Judges Rives and Johnson concur in this judgment, Judge Lynne dissents therefrom except as to the order of suspension, in which he concurs.

This the 19th day of June, 1956.

RICHARD T. RIVES,
United States Circuit Judge.
SEYBOURN H. LYNNE,
United States District Judge.
FRANK M. JOHNSON, JR.,
United States District Judge.

APPENDIX B

Constitution of the United States, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code, Title 28, Section 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

United States Code, Title 28, Section 2284:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

"If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

"Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest

practicable day. Two judges must concur in granting the application.

"(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968."

United States Code, Title 28, Section 1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

United States Code, Title 28, Section 2101(b):

"Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

United States Code, Title 42, Section 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R. S. S. 1977."

United States Code, Title 42, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. S. 1979."

Title 37, Section 587, Code of Alabama, 1940, as amended:

"(1937) (1217) Appeal from recorder's court.—In any case involving the validity of an ordinance of the city, tried before the recorder, the council may take an appeal, without bond, to the circuit court or court of like jurisdiction; and in any case the defendant may take an appeal to such court by giving bond with good and sufficient sureties, payable to the city, to be approved by the recorder or officer trying the case, or should such recorder or officer trying the case be prevented, by absence from the city, death or other disability, from approving such bond, such bond may be approved by the city clerk, conditioned to be void if the defendant appears before said court, until discharged by law to answer said charge, but unless such bond be given within five days from the date of the judgment, no appeal shall be allowed from such judgment. An appeal bond for more than three hundred dollars shall in no case be required, but when sitting as a committing magistrate, any reasonable bond may

be required. The case appealed shall be tried de novo in such court, and the judge or jury trying such cause is authorized to impose upon the person convicted such punishment by fine, or imprisonment in the city jail, or other place of confinement, or hard labor for the city, or by fine and imprisonment, as the court or jury may deem proper and is authorized by law or ordinance for such offenses. When an appeal is taken, as provided for herein, said appeal shall be filed by the city in the court to which said appeal is returnable within sixty days; and if the city shall fail to file said appeal within said time, the city shall be deemed to have abandoned the prosecution of said cause, and the defendant shall not be required to further answer or appear, and the bond shall thereafter be void. When the city is situated within two or more counties, the appeal shall lie to the circuit court of the county where the transaction involved in the case took place. (1923, p. 737; 1953, p. 1181, appvd. Sept. 19, 1953; 1955, No. 374, appvd. Sept. 8, 1955.)"

Title 37, Section 588, Code of Alabama, 1940:

"(1938) (1218) Judgments on appeals from recorder's court; proceedings thereon.—If such defendant fails to appear in the court to which an appeal was taken, when the case is called for trial, unless good cause is shown to the court for his absence or default, the court shall enter up a judgment of forfeiture on said appeal bond against the defendant and his sureties as is authorized or provided by law in criminal cases, and a new warrant of arrest may issue from the court without any other authority therefor, and the court may also, on motion of the solicitor or his assistant where the prosecution is in the name of the state, or on motion of the attorney prosecuting for the city or town where the prosecution is in the name of the city or town, or in the absence of such motion ex mero motu, dismiss such appeal. Upon the dismissal of such appeal, and by the fact of such dismissal of such appeal, the judgment of the recorder's court against the defendant shall be reinstated and become final and the clerk of such court to which such case was appealed, must, in writing, notify the mayor or other chief executive or the recorder of said city or town

of the judgment of the court dismissing such appeal; provided, however, that the court to which said appeal was taken may, on motion of the defendant made within thirty days from the date of the order of dismissal, set aside such dismissal and reinstate such appeal on such terms as the court may prescribe, for good cause shown by the defendant for his absence or default. When such appeal has been dismissed, the court may at any time issue a warrant, and alias and pluries warrants, against the defendant, and the defendant may also be arrested without a warrant as an escape, and when so arrested, the defendant shall be delivered to the chief of police or marshal or any policeman of said city or town and punished in accordance with the original judgment of the recorder's court, and in case the defendant appears on such appeal and judgment is rendered against him, unless the fine and costs are presently paid, or a judgment confessed therefor in favor of the city or town by the defendant, with sureties in the same manner as provided for in convictions for violating the state laws, the said court to which said appeal was taken must remand the defendant to the city or town authorities for punishment, and the clerk of such court must in writing notify the mayor or other chief executive or the chief of police of said city or town of the judgment of the court trying such case, and said notice shall accompany the defendant when he is delivered to the city or town authorities for punishment; but, if the judgment of such court is paid, the clerk of said court may receive such fine and costs and the defendant may be discharged, and such clerk must, under a penalty of five percent per month thereon for a failude to do so, pay said money to the treasurer of the city or town, or to the officer corresponding to the treasurer thereof within thirty days after he receives it. His bondsmen shall also be liable for said penalty, and the amount thereof with the money collected may be recovered on motion after three days' notice. (1935, p. 1107.)"

Title 37, Section 593, Code of Alabama, 1940:

"(1943) (1220) Appeal to supreme court.—From the judgment of said circuit court or other court of like jurisdiction, the city, in a case involving the validity

of an ordinance, or the defendant in any case, may appeal to the supreme court of the state; and if the appeal is taken by the town or city, it shall give security for the costs of appeal. When taken by a defendant, he may give bail with sufficient sureties, conditioned that he will appear and abide the judgment of the appellate court, and failing to give bail, he must be committed to the town or city jail; but may give such bail at any time pending the appeal. When the appeal is taken by the defendant and bail is given pending the appeal, and the judgment of conviction is affirmed or the appeal is dismissed, the defendant is bound by the undertaking of bail to surrender himself to the town marshal or chief of police of the city within fifteen days from the date of such affirmance or dismissal, and if he shall fail to do so, the clerk of the court from which the appeal is taken, upon motion of the city, must endorse the bail bond forfeited, and a writ of arrest must be issued by such clerk to the sheriff, and if not executed another must be issued, and so on until the defendant is arrested, and upon arrest he shall be delivered to the chief marshal or chief of police and the sentence must, without delay, be carried out as if no appeal had been taken; and whenever an undertaking of bail is forfeited as herein provided, a conditional judgment must be rendered by the court in favor of the city and the same proceedings had thereon for the city as is authorized by law to be had in the name of the state for the use of the county in state cases. (1935, p. 1101.)"

Title 48, Sections 301 (31a, 31b and 31c), Code of Alabama, 1940, as amended:

"301(31a). Separate accommodations for white and colored races.—All passenger stations in this state operated by any motor transportation company shall have separate waiting rooms or space and separate ticket windows for the white and colored races, but such accommodations for the races shall be equal. All motor transportation companies or operators of vehicles carrying passengers for hire in this state, whether intrastate or interstate passengers, shall at all times provide equal but separate accommodations on each

vehicle for the white and colored races. The conductor or agent of the motor transportation company in charge of any vehicle is authorized and required to assign each passenger to the division of the vehicle designated for the race to which the passenger belongs; and, if the passenger refuses to occupy the division to which he is assigned, the conductor or agent may refuse to carry the passenger on the vehicle; and, for such refusal, neither the conductor or agent of the motor transportation company nor the motor transportation company shall be liable in damages. Any motor transportation company or person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than five hundred dollars for each offense; and each day's violation of this section shall constitute a separate offense.

"The provisions of this section shall be administered and enforced by the Alabama public service commission in the manner in which provisions of the Alabama Motor Carrier Act of 1939 are administered and enforced. (1945, p. 731, appvd. July 6, 1945.)

"301(31b). Operators of passenger stations and carriers authorized to segregate white and colored races.—All passenger stations in this state operated by or for the use of any motor transportation company shall be authorized to provide separate waiting rooms, facilities, or space, or separate ticket windows, for the white and colored races but such accommodations for the races shall be equal. All motor transportation companies and operators of vehicles, carrying passengers for hire in this state, whether intrastate or interstate passengers, are authorized and empowered to provide separate accommodations on each vehicle for the white and colored races. Any officer or agent of such motor transportation company or operator, in charge of any vehicle, is authorized to assign or reassign each passenger or person to a division, section or seat on the vehicle designated by such company or operator, or by such officer or agent, for the race to which the passenger or person belongs; and if the passenger or person refuses to occupy the division, section or seat to which he is so assigned, such officer or

agent may refuse further to carry the passenger on the vehicle. For such refusal neither the officer nor agent, nor the motor transportation company, nor operator, shall be liable in damages. (1947, p. 40, S. 1, appvd. July 18, 1947.)

"301(31c). Failure to comply with rules and regulations as to segregation of white and colored races.—It shall be unlawful for any person willfully to refuse or fail to comply with any reasonable rule, regulation, or directive of any operator of a passenger station in this state operated by or for the use of any such motor transportation company, or of any authorized officer or agent of such operator, providing separate waiting rooms, facilities, or space, or separate ticket windows, for white and colored races; or willfully to refuse or fail to comply with any reasonable assignment or reassignment by any officer or agent in charge of any vehicle of any such motor transportation company or of any operator of vehicles carrying passengers for hire, of any passenger or person to a division, section, or seat on such vehicle designated by such officer or agent for the race to which such passenger or person belongs; any person so refusing or failing to comply with any such reasonable rule, regulation, or assignment, as aforesaid, shall be guilty of a misdemeanor and upon conviction shall be fined not more than $500.00 for each offense. (1947, p. 40, S. 2, appvd. July 18, 1947.)"

Code of the City of Montgomery, 1952, Chapter 6:

"Section 10.

"Every person operating a bus line in the city shall provide equal but separate accommodations for white people and negroes on his buses, by requiring the employees in charge thereof to asign passengers seats on the vehicles under their charge in such manner as to separate the white people from the negroes, where there are both white and negroes on the same car; provided, however, that negro nurses having in charge white children or sick or infirm white persons, may be assigned seats among white people.

"Nothing in this section shall be construed as prohibiting the operators of such bus lines from separating the races by means of separate vehicles if they see fit. (Code 1938, Ss. 603, 606.)

"Section 11.

"Any employee in charge of a bus operated in the city shall have the powers of a police officer of the city while in actual charge of any bus, for the purpose of carrying out the provisions of the preceding section, and it shall be unlawful for any passenger to refuse or fail to take a seat among those assigned to the race to which he belongs, at the request of any such employee in charge, if there is such a seat vacant. (Code 1938, S. 604.)"

Code of the City of Montgomery, 1952, Chapter 1, Section 6:

"Wherever in this Code, or in any ordinance, or rule or regulation promulgated by any officer or agency of the city under authority vested in him or it by law or ordinance, any act is prohibited or is declared to be unlawful, or the doing of any act is required, or the failure to do any act is declared to be unlawful, and no specific penalty is provided therefor, the violation of any such provision of this Code, or any such ordinance, rule or regulation shall be punished by a fine of not less than one nor more than one hundred dollars, or by imprisonment in jail or at hard labor for a period of not exceeding six months, or by both such fine and imprisonment, at the discretion of the recorder. Each day any violation of this Code or any such ordinance, rule or regulation continues shall constitute a separate offense. (Code 1938, S. 590.)"

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JOHN T. FEY, Cl

NO. 343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

C. C. (Jack) Owen, Jimmy Hitchcock, and Sibyl Pool, as members of the Alabama Public Service Commission,

Appellants

VS.

Aurelia S. Browder, and Susie McDonald and Claudette Colvin, by Q. P. Colvin, next friend, and Mary Louise Smith, by Frank Smith, next friend, and others similarly situated,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

JURISDICTIONAL STATEMENT

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IN THE

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NO.....

C. C. (Jack) Owen, Jimmy Hitchcock, and Sibyl Pool, as members of the Alabama Public Service Commission,
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VS.

Aurelia S. Browder, and Susie McDonald and Claudette Colvin, by Q. P. Colvin, next friend, and Mary Louise Smith, by Frank Smith, next friend, and others similarly situated,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JURISDICTIONAL STATEMENT

Appellants, C. C. (Jack) Owen, Jimmy Hitchcock, and Sibyl Pool, as members of the Alabama Public Service Commission, appeal from the judgment of the three-judge United States District Court for the Middle District of Alabama, Northern Division, entered on June 19, 1956, declaring certain statutes of the State of Alabama and ordinances of the City of Montgomery, Ala-

bama, relating to the separation of the races on buses, to be unconstitutional and void and enjoining these appellants from enforcing them, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Middle District of Alabama, Northern Division, is not yet reported. Copies of the opinion, findings of fact, conclusions of law and all judgments of said court entered in the cause are attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U. S. C. Sections 1331 and 1343(3), and under 42 U. S. C., Sections 1981 and 1983, to have certain statutes and ordinances relating to the separation of the races on buses declared unconstitutional, and for injunctive relief. The judgment of the District Court was entered on June 19, 1956, and notice of appeal was filed in that court on June 28, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Palmetto Fire Ins. Co. v. Conn.*, 272 U. S. 295; *Oklahoma Gas and Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386.

QUESTIONS PRESENTED

(a) Where members of the Alabama Public Service Commission have disclaimed any jurisdiction over or authority to enforce statutes and ordinances providing for the separation of the races on buses operated wholly within the City of Montgomery, Alabama, and its police jurisdiction, and have never enforced or attempted or threatened to enforce same, may the District Court, under such facts, validly enjoin said members from enforcing such statutes and ordinances?

(b) Are these appellants required by the provisions of Section 301 (31a, 31b and 31c), Title 48, Code of Alabama 1940, as amended, to enforce segregation of Negro and white passengers on motor buses operated wholly within the City of Montgomery, Alabama, and its police jurisdiction?

(c) Are Section 301 (31a, 31b and 31c), Title 48, Code of Alabama 1940, as amended, and Sections 10 and 11 of Chapter 6 of the Code of the City of Montgomery, Alabama, 1952, requiring the segregation of Negro and white passengers on motor buses, constitutional and valid?

STATUTES INVOLVED

Act No. 508, General Acts of Alabama 1945, page 731 (Title 48, Section 301 (31a), 1955 Cumulative Pocket Part, Code of Alabama 1940), Act No. 130, General Acts of Alabama 1947, page 40 (Title 48, Section 301 (31b and 31c), 1955 Cumulative Pocket Part, Code of Alabama 1940), and Sections 10 and 11 of

Chapter 6 of the 1952 Code of the City of Montgomery, Alabama, are set forth in Appendix B hereto.

STATEMENT

The appellees are four Negro citizens who sue for themselves and on behalf of all other Negroes similarly situated. The defendants in the court below are the members of the Board of Commissioners, and the Chief of Police of the City of Montgomery, Alabama, the members of the Alabama Public Service Commission, The Montgomery City Lines, Inc., and two of its employee drivers.

The purpose of the suit is to test the constitutionality of both the statutes of the State of Alabama and ordinances of the City of Montgomery, Alabama, which require the segregation of the white and Negro races on the motor buses of the Montgomery City Lines, Inc., a common carrier of passengers operating wholly within said city and its police jurisdiction, and for injunctive relief.

Each of the four named appellees has either been required by a bus driver or by the police to comply with said segregation laws or has been arrested and fined for her refusal to do so. The appellees, along with most other Negro citizens of the City of Montgomery, have since December 5, 1955, refrained from making use of the transportation facilities provided by Montgomery City Lines, Inc.

The members of the Board of Commissioners and the Chief of Police seek to enforce the statutes of Alabama and said ordinances.

The bus drivers, defendants Blake and Cleere, have acted pursuant to orders of Montgomery City Lines, Inc., and have operated its buses on the basis of racial segregation as required by said statutes and ordinances.

The Montgomery City Lines, Inc., has operated and now continues to operate its buses on a segregated basis, pursuant to orders of a state court which are still in full force and effect.

These appellants claim that the Alabama Public Service Commission has no authority to enforce segregation on buses operated wholly within the City of Montgomery and its police jurisdiction. The evidence shows without dispute that the Commission has not attempted to enforce or threatened to enforce segregation on buses of Montgomery City Lines, Inc. The bus company gets its franchise from, and its fares are regulated wholly by, the City of Montgomery. The Alabama Public Service Commission has no jurisdiction over these matters. Indeed, the Alabama Motor Carrier Act of 1939, Act No. 669, General Acts of Alabama 1939, page 1064, as last amended by Act No. 547, General and Local Acts of Alabama 1955, page 1204, expressly provides that the Act shall not be construed to apply to "motor vehicles for hire while operating wholly within the limits of a city or incorporated town or within the police jurisdiction thereof." To like effect is the holding of the Supreme Court of Alabama in *Smith Transfer Co. v. Robins Transfer Co.*, 258 Ala. 406, 63 So. 2d 351.

The evidence is without dispute that, other than being separate, the accommodations on the buses are not only equal but identical.

The court below held that the separate but equal doctrine cannot be validly applied to public carrier transportation within the City of Montgomery and its police jurisdiction; that the doctrine can no longer be safely followed as a correct statement of the law; it declared the statutes and ordinances to be unconstitutional and void in that they deny and deprive appellees and other Negro citizens similarly situated of the equal protection of the laws and due process of law secured by the Fourteenth Amendment to the Constitution of the United States, and rights and privileges secured by Title 42, United States Code, Sections 1981 and 1983, and enjoined all appellants from enforcement thereof.

THE QUESTIONS ARE SUBSTANTIAL

1. To justify the use of the extraordinary power of a court of equity, there must be proof of threatened injury under some recognized sources of equitable jurisdiction. *Petroleum Exploration v. Public Service Commission*, 304 U. S. 209.

Equitable relief can never be against persons to prevent them from doing that which they have never threatened to do and have no power to do. *Blease v. Safety Transit Co.*, 50 F. 2d 852; *Virginia Electric & Power Co. v. National Labor Relations Board*, 115 F. 2d 414; *Baltimore Transit Co. v. Flynn*, 50 F. Supp. 382.

A court of equity will not grant injunctive relief in the absence of proof of any threatened or probable act which might cause irreparable injury. *Public Service Commission v. Wycoff Co.*, 344 U. S. 237.

The evidence is undisputed that the Alabama Public Service Commission has never attempted or threatened to enforce the statutes and ordinances relating to the segregation of the races on buses operated by Montgomery City Lines, Inc.

Act No. 508, supra, provides that all motor transportation companies or operators of vehicles carrying passengers for hire in this State, whether intrastate or interstate passengers, shall at all times provide equal but separate accommodations on each vehicle for the white and colored races. The Act concludes by providing, "The provisions of this section shall be administered and enforced by the Alabama Public Service Commission in the manner in which provisions of the Alabama Motor Carrier Act of 1939 are administered and enforced."

As hereinbefore pointed out, the said Motor Carrier Act specifically states that it does not apply to "motor vehicles for hire while operating wholly within the limits of a city or incorporated town or within the police jurisdiction thereof." The case of ***Smith Transfer Co. v. Robins Transfer Co.***, 258 Ala. 406, 63 So. 2d 351, is authority for the position that the Supreme Court of Alabama does not regard the Alabama Public Service Commission as having any kind of jurisdiction over a city transportation system.

The court below recognized the weakness of its opinion holding otherwise by stating, "If, in law and fact, the Commission has no jurisdiction over the operation of the buses here involved, the retention of the members of the Commission as parties defendant will be harmless to them, even if erroneous." We most emphatically disagree. The members of the Commission have a constitu-

tional or legal right to be free from the injunctive processes of any court unless the evidence warrants the granting of such injunction. Furthermore, it is certainly not harmless error to be forced to appeal to this court with the cost and expense incident to such an appeal. We cannot subscribe to any such thinking on the part of any court. The jurisdiction of the Alabama Public Service Commission, under Act No. 508, supra, is limited to transportation systems other than those operating wholly within a city and its police jurisdiction.

Neither is the telegram sent by one member of the Commission the act of the Commission. Act No. 508, supra, says that the Act shall be enforced by the Alabama Public Service Commission, not the individual members thereof. If the telegram can be considered a threat to enforce the act as to city buses, the evidence is undisputed that the other two members of the Commission did not authorize its sending.

The following cases are sufficient to show that a substantial question is presented by the erroneous action of the court below in granting an injunction against these appellants: *Connecticut v. Massachusetts*, 282 U. S. 660; *Watson v. Buck*, 313 U. S. 387; *Public Service Commission v. Wycoff Co.*, 344 U. S. 237; 43 C.J.S., Injunctions, Section 21 at page 436.

2. The main question in this case is whether the statutes and ordinances requiring the segregation of the white and Negro races on common carrier motor buses in the City of Montgomery, Alabama, and its police jurisdiction are constitutional and valid.

The decision of this question is of nation-wide im-

portance. *Plessy v. Ferguson*, 163 U. S. 537, is exactly in point. Its holding is to the effect that similar statutes and ordinances are constitutional and valid. This case has never been overruled by the Supreme Court of the United States. This alone is enough to show that a substantial question is presented. This case should be set down for oral argument. The lower courts and the people should be given a clear cut, and duly considered written opinion disposing of these questions one way or the other. It is disturbing to the legal profession to allow lower courts to disregard Supreme Court decisions and indulge in guessing what the Supreme Court will decide at some future time when the same question is again presented.

In the case of *Brown v. Board of Education*, 347 U. S. 483, the holding was that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities were held to be inherently unequal.

Here, we do not have separate buses, one for whites and the other for Negroes. They are on the same buses already. *Brown* put them in the same school buildings, but did not go so far as to hold that a teacher, if the welfare of the children demanded it, could not separate them in the schoolrooms. Here, both races have the same bus drivers, ride on the same buses, see the same sights when riding, look out of identical windows, pay the same fare and sit in identical seats. The accommodations are identical in every respect. No public funds are involved. The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience. This cannot be done and peace and order maintained in Montgomery, Alabama, and

other similar places if, by court decree, a Negro man is permitted to sit by a white woman. The Supreme Court of the United States should face squarely the truth and reality of that fact. *Brown* has no application to segregation on buses operated within a city and its police jurisdiction.

Boozie v. Birmingham Railway and Electric Company, 125 Ala. 397, 27 So. 1016, is more in point today than when decided. The Supreme Court of Alabama adopted in the main *West Chester & Philadelphia Railroad Co. v. Miles*, 55 Pa. St. 209, which, in pertinent part, had this to say:

> "'. . . The ladies' car is known upon every well regulated railroad, implies no loss of equal right on the part of the excluded sex, and its propriety is doubted by none.
>
> . . . . . .
>
> "'. . . The right of the passenger is only that of being carried safely, and with a due regard to his personal comfort and convenience, which are promoted by a sound and well regulated separation of passengers. An analogy and an illustration are found in the case of an innkeeper, who, if he have a room, is bound to entertain proper guests, and so a carrier is bound to receive passengers. But a guest at an inn cannot select his room or his bed at pleasure; nor can a voyager take possession of a cabin or a berth at will or refuse to obey the reasonable orders of the captain of a vessel. But, on the other hand, who would maintain that it is a reasonable regulation, either of an inn or a vessel, to *compel* the passengers, black and white, to room and bed together? . . . .
>
> . . . . . .

"'The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this State, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separate-

ness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.

. . . . . .

"'. . . Law and custom having sanctioned a separation of races, it is not the province of the judiciary to legislate it away. We cannot say there was no difference in fact, when the law and the voice of the people had said there was. The laws of the State are founded on its constitution, statutes, institutions and general customs. It is to these sources judges must resort to discover them. If they abandon these guides they pronounce their own opinions, not the laws of those whose officers they are. Following these guides, we are compelled to declare that, at the time of the alleged injury, there was that natural, legal and customary difference between the white and black races in this State which made their separation as passengers in a public conveyance the subject of a sound regulation to secure order, pro-

mote comfort, preserve the peace and maintain the rights of both carriers and passengers.' "

To like effect is *Plessy v. Ferguson*, supra, where it was expressly held that, "Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power." Again, *Plessy* held, "If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the court of appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448 (45 Am. Rep. 232), 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. . . .' "

For over a hundred years the above was the thinking and almost universal opinion of courts everywhere, including opinions of some of the most learned and distinguished Justices ever to sit on the Supreme Court of the United States.

In *Brown* it was said that the present court could not turn the clock back to 1896 when *Plessy* was written, but that public education must be considered in the light of its full development and its present place in American life throughout the Nation.

What has happened in the field of public transportation on city buses which forbids the court from turning

the clock back to *Plessy v. Ferguson?* What "full development" has taken place in this field which requires the court to reject *Plessy?* We submit there has been none.

It will be most difficult indeed to write an opinion which overrules *Plessy* and to support the same either by law or logic.

We believe that substantial questions of public importance are presented in this case. We sincerely hope that the court will confine itself to the evidence in the case. No modern authority dealing with the psychological effects of enforced segregation in public transportation is in evidence, and none should be considered. Among other things, the rules of evidence and the right of cross-examination as understood by the lawyers of America should be preserved. The court should grant oral argument to the end that the judgment of the lower court be reversed and the pertinent statutes and ordinances held constitutional and valid.

Respectfully submitted,

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I, William N. McQueen, one of the attorneys for appellants, C. C. (Jack) Owen, Jimmy Hitchcock and Sibyl Pool, as members of the Alabama Public Service Commission, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of August, 1956, I served copies of the foregoing jurisdictional statement on the several appellees thereto by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

TO: Charles D. Langford *Attorney for Appellees*
113 Monroe Street
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Fred D. Gray *Attorney for Appellees*
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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

AURELIA S. BROWDER, and SUSIE McDONALD and CLAUDETTE COLVIN, by Q. P. COLVIN, next friend, and MARY LOUISE SMITH, by Frank Smith, next friend, and others similarly situated,

Plaintiffs

vs. NO. 1147

W. A. GAYLE, CLYDE SELLERS and FRANK PARKS, individually and as members of the Board of Commissioners of the City of Montgomery, Alabama, and GOODWYN J. RUPPENTHAL, individually and as Chief of Police of the City of Montgomery, Alabama, and THE MONTGOMERY CITY LINES, INC., a Corporation, and JAMES F. BLAKE, and ROBERT CLEERE, and C. C. (JACK) OWEN, JIMMY HITCHCOCK and SIBYL POOL, as members of the ALABAMA PUBLIC SERVICE COMMISSION,

Defendants

Before RIVES, Circuit Judge, and LYNNE and JOHNSON, District Judges:
RIVES, Circuit Judge:

STATEMENT OF THE CASE

The purpose of this action is to test the constitutionality of both the statutes of the State of Alabama[1] and

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[1] Title 48, Sec. 301 (31a,b,c), Code of Alabama 1940, as amended, which provides:

"Sec. 301 (31a). Separate accommodations for white and colored races. — All passenger stations in this state operated by any motor transportation company shall have separate waiting rooms or space and separate ticket windows for the white and colored races, but such accommodations for the races shall be equal. All motor transportation companies or operators of vehicles carrying passengers for hire in this state, whether intrastate or interstate passengers, shall at all times provide equal but separate accommodations on each vehicle for the white and colored races. The conductor or agent of the motor transportation company in charge of any vehicle is authorized and required to assign each passenger to the division of the vehicle designated for the race to which the passenger belongs; and, if the passenger refuses to occupy the division to which he is assigned, the conductor or agent may refuse to carry the passenger on the vehicle; and, for such refusal, neither the conductor or agent of the motor transportation company nor the motor transportation company shall be liable in damages. Any motor transportation company or person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than five hundred dollars for each offense; and each day's violation of this section shall constitute a separate offense.

"The provisions of this section shall be administered and enforced by the Alabama Public Service Commission in the manner in which provisions of the Alabama Motor Carrier

Act of 1939 are administered and enforced. (1945, p. 731, appvd. July 6, 1945.)

"Sec. 301 (31b). Operators of passenger stations and carriers authorized to segregate white and colored races. — All passenger stations in this state operated by or for the use of any motor transportation company shall be authorized to provide separate waiting rooms, facilities, or space, or separate ticket windows, for the white and colored races but such accommodations for the races shall be equal. All motor transportation companies and operators of vehicles, carrying passengers for hire in this state, whether intrastate or interstate passengers, are authorized and empowered to provide separate accommodations on each vehicle for the white and colored races. Any officer or agent of such motor transportation company or operator, in charge of any vehicle, is authorized to assign or reassign each passenger or person to a division, section or seat on the vehicle designated by such company or operator, or by such officer or agent, for the race to which the passenger or person belongs; and if the passenger or person refuses to occupy the division, section or seat to which he is so assigned, such officer or agent may refuse further to carry the passenger on the vehicle. For such refusal neither the officer nor agent, nor the motor transportation company, nor operator, shall be liable in damages. (1947, p. 40, Sec. 1, appvd. July 18, 1947.)

"Sec. 301 (31c). Failure to comply with rules and regulations as to segregation of white and colored races. — It shall be unlawful for any person willfully to refuse or fail to comply with any reasonable rule, regulation, or directive of any operator of a passenger station in this state operated by or for the use of any such motor transportation company, or of any authorized officer or agent of such operator, providing separate waiting rooms, facilities, or space, or separate ticket windows, for white and colored races; or willfully to refuse or fail to comply with any reasonable assignment or reassignment by any officer or agent in charge of any vehicle of any such motor transportation company or of any operator of vehicles carrying passengers for hire, of

the ordinances of the City of Montgomery[2] which require the segregation of the white and colored races on the motor buses of the Montgomery City Lines, Inc., a common carrier of passengers in said City and its police jurisdiction.

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any passenger or person to a division, section, or seat on such vehicle designated by such officer or agent for the race to which such passenger or person belongs; any person so refusing or failing to comply with any such reasonable rule, regulation, or assignment, as aforesaid, shall be guilty of a misdemeanor and upon conviction shall be fined not more than $500.00 for such offense. (1947, p. 40, Sec. 2, appvd. July 18, 1947.)"

[2] Section 10, Chapter 6, Code of the City of Montgomery, 1952, which provides:

"Every person operating a bus line in the city shall provide equal but separate accommodations for white people and negroes on his buses, by requiring the employees in charge thereof to assign passengers seats on the vehicles under their charge in such manner as to separate the white people from the negroes, where there are both white and negroes on the same car; provided, however, that negro nurses having in charge white children or sick or infirm white persons, may be assigned seats among white people.

"Nothing in this section shall be construed as prohibiting the operators of such bus lines from separating the races by means of separate vehicles if they see fit."

Section 11 of Chapter 6, Montgomery City Code of 1952, further provides:

"Any employee in charge of a bus operated in the city shall have the powers of a police officer of the city while in actual charge of any bus, for the purpose of carrying out the provisions of the preceding section, and it shall be unlawful for any passenger to refuse or fail to take a seat among those assigned to the race to which he belongs, at the request of any such employee in charge, if there is such a seat vacant."

The plaintiffs are four Negro citizens who bring this action for themselves and on behalf of all other Negroes similarly situated.[3] The defendants are the members of the Board of Commissioners and the Chief of Police of the City of Montgomery, the members of the Alabama Public Service Commission, The Montgomery City Lines, Inc., and two of its employee drivers.

Each of the four named plaintiffs has either been required by a bus driver or by the police to comply with said segregation laws or has been arrested and fined for her refusal so to do. The plaintiffs, along with most other Negro citizens of the City of Montgomery, have since December 5, 1955, and up to the present time, refrained from making use of the transportation facilities provided by Montgomery City Lines, Inc. Plaintiffs and other Negroes desire and intend to resume the use of said buses if and when they can do so on a non-segregated basis without fear of arrest.

The members of the Board of Commissioners and the Chief of Police of the City of Montgomery in their answers to the complaint admit "that they seek to enforce the statutes of the State of Alabama and the ordinances of the City of Montgomery, Alabama," and further aver that "segregation of privately owned buses within cities within the State of Alabama is in accordance with the laws of the State of Alabama and the City of Montgomery."

The members of the Alabama Public Service Commission deny that they, in their official capacities as such members have any jurisdiction over, or have issued

[3] Rule 23(a), F.R.C.P.

any orders relating to the separation of the races on buses operated wholly within the City of Montgomery and its police jurisdiction. On information and belief they allege that the members of the Board of Commissioners and the Chief of Police of said City "have sought to enforce by legal means constitutional and valid statutes and ordinances providing for separate but equal seating arrangements on buses operated in the City of Montgomery, Alabama, and its police jurisdiction."

The Montgomery City Lines, Inc., admits that it has operated, and pursuant to orders of a State Court, continues to operate "its buses as required by the Statutes and Ordinances set out in the Complaint requiring it to provide equal but separate accommodations for the white and colored races." Without dispute the evidence is to the effect that, other than being separate, such accommodations are equal.

The defendants, Blake and Cleere, admit they are employees of the Montgomery City Lines and drivers of its buses, that as such they have acted pursuant to orders of said Company which "has operated its buses on the basis of racial segregation as required by said statutes and ordinances." They deny that as drivers of said buses they are exercising the powers of police officers in the enforcement of said statutes and ordinances.

The complaint prays for the convening of a three-judge district court as provided by Title 28 of the United States Code, §2284; for a declaratory judgment as to whether the enforcement of said statutes and ordinances abridges the privileges and immunities of plaintiffs as citizens of the United States, or deprives them of liberty without due process of law, or denies to them the

equal protection of the laws, as secured by the Fourteenth Amendment to the Constitution of the United States,[4] and the rights and privileges secured to them by Title 42, United States Code, §§1981 and 1983.[5] The complaint further prays that the defendants be both temporarily and permanently enjoined from enforcing the statutes and ordinances claimed to be unconstitutional and in conflict with said Federal statutes.

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[4] Fourteenth Amendment, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[5] Section 1981. Equal rights under the law.

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"Section 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

FEDERAL JURISDICTION

Federal jurisdiction is invoked under Title 28, United States Code, §§1331 and 1343(3),[6] and under Title 42, United States Code, §§1981 and 1983, footnote 5, supra. We think that the validity of both the State statutes and the City ordinances is in question, but if only the City ordinances are involved, Federal jurisdiction would still exist because the Constitution and statutes of Alabama authorize the adoption of City ordinances "not inconsistent with the laws of the State",[7] and because the constitutional phrase "equal protection

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[6] "Section 1331. Federal question; amount in controversy.

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

"Section 1343. Civil rights.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[7] Constitution of Alabama of 1901, §89; Alabama Code of 1940, Title 37, §455.

of the laws" refers to City ordinances adopted under State authority as well as to State statutes.[8]

JURISDICTION OF THREE JUDGE DISTRICT COURT

A three judge district court is required for the granting of "an interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State." 22 U.S.C.A. 2281. According to the complaint and the answers, the separation of the races on the buses is required both by State statutes and by City ordinances. Admittedly, therefore, State statutes are involved. The defendants claim, however, that the statutes and ordinances are being enforced by municipal officers only, and not by "any officer of such State." 28 U.S.C.A. 2281, supra.

If the members of the Alabama Public Service Commission are proper parties defendant, a matter to be hereinafter discussed, then it must be conceded that the objection to the jurisdiction of the three judge district court fails. Irrespective of the answer to that question, however, we think that the three judge district court has jurisdiction.

The State statutes, footnote 1, supra, vest in the defendant bus drivers the authority to enforce, and, notwithstanding their insistence to the contrary, we think

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[8] *Buchanan v. Warley*, 245 U. S. 60; cf. 42 U.S.C.A. 1983; *Carson v. People of California*, 310 U. S. 106; *Lovell v. City of Griffin*, 303 U. S. 444; *North American Cold Storage Co. v. Chicago*, 211 U. S. 306; *El Paso v. Texas Cities Gas Co.*, 5th Cir. 100 F.2d 501.

that when so engaged the bus drivers clearly are officers of the State.

The City Commissioners have important duties to perform in connection with the enforcement, operation, and execution of State statutes. Under Alabama law, a municipal corporation "is essentially a public agency, a local unit of government, invested with a portion of the sovereign power of the State, for the benefit of its inhabitants." *Cooper v. Town of Valley Head*, 212 Ala. 125; 101 So. 874, 875. The defendant Chief of Police has authority to make arrests for violations of State statutes, 1940 Code of Alabama, Title 15, §152. The City Recorder in criminal cases has the power of an ex-officio justice of the peace, 1940 Code of Alabama, Title 37, §585. All of the City officials admit in their answers that they are enforcing the State statutes. An official, though localized by his geographic activities and the mode of his selection, is performing a State function when he enforces a statute which "embodies a policy of statewide concern."[9]

Very clearly, the three judge district court has jurisdiction.[10]

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[9] *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89; *Rorick v. Commissioners*, 307 U. S. 208, 212; *Cleveland v. United States*, 323 U. S. 329, 332; *Watch Tower Bible & Tract Society v. Bristol*, D. Ct. Conn., 24 F.S. 57, affirmed 305 U. S. 572; *Suncrest Lumber Co. v. N. C. Park Commission*, 4th Cir., 29 F.2d 823.

[10] If, however, the proceedings were not such as to require the presence of three judges, the judgment would still be valid as the act of the court of one judge, since that judge concurs and joins in the rendition of the judgment. *Commission v. Brasher Lines*, 312 U. S. 621, 626; *O'Malley v. U. S.*, 8th Cir., 128 F.2d 676, 687.

COMITY

The defendants, relying on *Alabama Public Service Commission v. Southern Railway Co.*, 341 U. S. 341, insist that even if the Federal court has jurisdiction, it should, in its discretion as a court of equity, and for reasons of comity, decline to exercise such jurisdiction until the State courts have ruled on the construction and validity of the statutes and ordinances. The short answer is that that doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal courts have a responsibility as heavy as that which rests on the State courts.[11]

PARTIES

Without repeating the averments of the complaint we hold that they are clearly sufficient to constitute this a class action on behalf of the four individual plaintiffs and of all other Negro citizens similarly situated. See Rule 23(a), F.R.C.P.

It was probably not necessary for the plaintiffs to sue the members of the Board of Commissioners and the Chief of Police, not only as such but also individually, when no relief is sought against them by way of damages. If, however, the plaintiffs' contentions are sustained, these defendants are acting not only in their capacities as municipal officers, but also as officers of

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[11] *Lane v. Wilson*, 307 U. S. 268, 274; *Mitchell v. Wright*, 5th Cir., 154 F.2d 924, 926; *Romero v. Weakley*, 9th Cir., 226 F.2d 399, 402; *Wilson v. Beeba*, Dis. Ct. Del., 99 F.S. 418, 420. *Cf. Doud v. Hodge*, 350 U. S. 485, 487.

the State; and, further, are possibly transcending the scope of their office in any capacity when they compel obedience to statutes and ordinances attacked as unconstitutional. Moreover, in issuing and enforcing an injunction, a court of equity acts in personam. If, as we trust will be true, no relief becomes necessary against any of them in their individual capacities, their joinder as individuals will prove harmless. The motion to strike said parties in their individual capacities is therefore denied.

The members of the Alabama Public Service Commission object to their joinder as parties defendant and move to dismiss the action as against them because they say that neither they nor the Commission have any jurisdiction over the buses which are being operated within the City of Montgomery and its police jurisdiction.[12]

In the Act approved July 6, 1945, General Acts of Alabama 1945, p. 731, now carried into the pocket supplement of the 1940 Code of Alabama as Title 48, §301 (31a), see footnote 1, supra, appears the following significant paragraph: "The provisions of this section shall be administered and enforced by the Alabama Public Service Commission in the manner in which provisions of the Alabama Motor Carrier Act of 1939 are administered and enforced."

Testifying as a witness, the President of the Alabama Public Service Commission admitted that on April 24, 1956, he sent a telegram to the National City Lines

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[12] Compare Code of Alabama 1940, Title 48, Sec. 239 with Sec. 2 of the Alabama Motor Carrier Act of 1939 carried into the pocket supplement of the Alabama Code as Title 48, Sec. 301 (2).

of Chicago, of which the Montgomery City Lines, Inc., is a subsidiary, reading as follows:

> "As president of the Alabama Public Service Commission, elected by the people of Alabama, sworn to uphold the segregation laws of this state, which include all forms of public transportation, I hereby defy ruling handed down by the United States Supreme Court ordering desegregation on public carriers. Alabama state law requiring segregation of the races on buses still stands. All public carriers in Alabama are hereby directed to strictly adhere to all present existing segregation laws in our state or suffer the consequences.
>
> /s/ C. C. (Jack) Owen, President
> Alabama Public Service"

That telegram was sent without the knowledge or concurrence of the other two Commissioners.

Since the 1945 Act expressly imposes on the Alabama Public Service Commission the duty of administering and enforcing its requirements as to segregation of the races, and since the President of the Commission has acted so positively and affirmatively to that end, the motion to dismiss the action as against the members of the Alabama Public Service Commission should be and the same is hereby denied.[13]

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[13]If, in law and fact, the Commission has no jurisdiction over the operation of the buses here involved, the retention of the members of the Commission as parties defendant will be harmless to them, even if erroneous.

VALIDITY OF SEPARATE BUT EQUAL DOCTRINE AS APPLIED TO INTRA-STATE TRANSPORTATION

The ultimate question is whether the statutes and ordinances requiring the segregation of the white and colored races on the common carrier motor buses in the City of Montgomery and its police jurisdiction are unconstitutional and invalid. Unless prohibited by the Constitution of the United States, the power to require such segregation is reserved to the States or to the People. — See Tenth Amendment.

In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the persons with whom they will do business, unimpaired by the Fourteenth Amendment. The Civil Rights Cases, 109 U. S. 3. Indeed, we think that such liberty is guaranteed by the due process clause of that Amendment.

There is, however, a difference, a constitutional difference, between voluntary adherence to custom and the perpetuation and enforcement of that custom by law. *Shelley v. Kraemer*, 334 U. S. 1, 13. The Fourteenth Amendment provides that "No State shall * * * deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Those provisions do not interfere with the police power of the States so long as the state laws operate alike upon all persons and property similarly situated. *Barbier v. Connolly*, 113 U. S. 27, 31, 32. That Amendment "merely requires that all persons subjected to such

legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Marchant v. Penn. Railroad*, 153 U. S. 380, 390. The equal protection clause requires equality of treatment before the law for all persons without regard to race or color. See e.g. *Strauder v. West Virginia*, 100 U. S. 303; *Buchanan v. Warley*, 245 U. S. 60; *Gong Lum v. Rice*, 275 U. S. 78; *Shelley v. Kraemer*, 334 U. S. 1.

In *Plessy v. Ferguson*, 163 U. S. 537, decided in 1896, the Supreme Court held as to intrastate commerce that a Louisiana statute requiring railway companies to provide equal but separate accommodations for the white and colored races was not in conflict with the provisions of the Fourteenth Amendment. That holding was repeatedly followed in later cases. *Chesapeake and Ohio Ry Co. v. Kentucky*, 179 U. S. 388 (1900); *Chiles v. Chesapeake and Ohio Ry. Co.*, 218 U. S. 71 (1910); *McCabe v. A. T. & S. F. Ry Co.*, 235 U. S. 151 (1914).

In *Morgan v. Virginia*, 328 U. S. 373 (1946), the Court held that a state statute requiring segregated seats for Negro passengers on interstate buses was an unconstitutional burden on interstate commerce. In *Henderson v. United States*, 339 U. S. 816 (1950), the Court held that interstate railroad regulations and practices assigning a separate table in a dining car to Negroes contravened the Interstate Commerce Act. The Court referred to the statutory right as "a fundamental right of equality of treatment," and cited cases construing the Fourteenth Amendment, see 339 U. S. 825, though the Court did not reach the constitutional question. The reasoning applied was similar to that employed in *Shelley v. Kraemer*, 324 U. S. 1, 22, where

the Court recognized that the underlying philosophy of the Fourteenth Amendment is the equality before the law of each individual.

In the field of college education, beginning in 1938 and continuing to the present time, the Court has first weakened the vitality of, and has then destroyed, the separate but equal concept. *Missouri ex rel Gaines v. Canada*, 305 U. S. 337 (1938); *Sipuel v. Board of Regents of Univ. of Oklahoma*, 332 U. S. 631 (1948); *Fisher v. Hurst*, 333 U. S. 147 (1948); *Sweatt v. Painter*, 339 U. S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (1950); *Hawkins v. Board of Control of University of Florida*, 347 U. S. 971 (1954); *Tureaud v. Board of Supervisors of L.S.U.*, 347 U. S. 971 (1954); *Lucy v. Adams*, 350 U. S. 1 (1955); *Florida ex rel Hawkins v. The Board of Control*, 350 U. S. 413; *Board of Trustees of the University of N. C. v. Frasier*, 350 U. S. 979 (1956).

The separate but equal concept had its birth prior to the adoption of the Fourteenth Amendment in the decision of a Massachusetts State court relating to public schools. *Roberts v. City of Boston*, 59 Mass. (5 Cush) 198 (1849). The doctrine of that case was followed in *Plessy v. Ferguson, supra.* In the School Segregation Cases, *Brown v. Board of Education*, 347 U. S. 483 (1954) and *Bolling v. Sharpe*, 347 U. S. 497 (1954) the separate but equal doctrine was repudiated in the area where it first developed, i.e., in the field of public education. On the same day the Supreme Court made clear that its ruling was not limited to that field when it remanded "for consideration in the light of the Segregation Cases * * * and conditions that now prevail" a case involving the rights of Negroes to use the recreational

facilities of city parks. *Muir v. Louisville Park Theatrical Association*, 347 U. S. 971 (1954).

Later the Fourth Circuit expressly repudiated the separate but equal doctrine as applied to recreational centers. *Dawson v. Mayor and City of Baltimore*, 4th Cir., 220 F. 2d 386, 387. Its judgment was affirmed by the Supreme Court, 350 U. S. 877. The doctrine has further been repudiated in holdings that the cities of Atlanta and of Miami cannot meet the test by furnishing the facilities of their municipal golf courses to Negroes on a segregated basis. *Rice v. Arnold*, 340 U. S. 848; *Holmes v. City of Atlanta*, 350 U. S. 879.

Even a statute can be repealed by implication. A fortiori, a judicial decision, which is simply evidence of the law and not the law itself, may be so impaired by later decisions as no longer to furnish any reliable evidence.[14]

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[14] This principle is aptly illustrated by the difference with which the Fourth Circuit treated *Plessy v. Ferguson* as a binding precedent in 1950, *Boyer v. Garrett*, 183 F. 2d 582 and in 1955, *Flemming v. South Carolina Electric & Gas Co.*, 224 F. 2d 752. In their change of views that distinguished Court headed by Chief Judge Parker was governed by the rule best stated by Judge Parker himself, speaking for a three judge district court in *Barnette v. West Virginia State Board of Education*, 47 F.S. 251, 252-3:

"Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the *Gobitis case*, however, are such that we do not

feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in *Jones v. City of Opelika*, 316 U. S. 584, 62 S. Ct. 1231, 1251, 86 L. Ed. 1691. The majority of the court in *Jones v. City of Opelika*, moreover thought it worth while to distinguish the decision in the *Gobitis case*, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."

To like effect is the opinion of Judge Frank for the Second Circuit in *Perkins v. Endicott Johnson Corporation*, 128 F. 2d 208, 217-218:

"We would stultify ourselves and unnecessarily burden the Supreme Court if — adhering to the dogma, obviously fictional to any reader of its history, that alterations in that court's principles of decision never occur unless recorded in explicit statements that earlier decisions are overruled — we stubbornly and literally followed decisions which have been, but not too ostentatiously, modified. 'The life of the law,' as Mr. Justice Holmes said, 'has been experience.' Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." See also *United States v. Girouard*, 1st Cir., 149 F. 2d 760, 765, dissenting opinion of Judge Woodbury, reversed 328 U. S. 6; *New Eng. Mutl. Life Ins. Co. v. Welch*, 1st Cir., 153 F. 2d 260, 262; *Picard v. United Aircraft Corp.*, 128

We cannot in good conscience perform our duty as judges by blindly following the precedent of *Plessy v. Ferguson, supra,* when our study leaves us in complete agreement with the Fourth Circuit's opinion[15] in *Flemming v. South Carolina Electric and Gas Co.,* 224 F. 2d 752, appeal dismissed April 24, 1956——U. S.——, that the separate but equal doctrine can no longer be safely followed as a correct statement of the law. In fact, we think that *Plessy v. Ferguson* has been impliedly, though not explicitly, overruled, and that, under the later decisions, there is now no rational basis upon which the separate but equal doctrine can be validly applied to public carrier transportation within the City of Montgomery and its police jurisdiction. The application of that doctrine cannot be justified as a proper execution of the state police power.[16]

We hold that the statutes and ordinances requiring segregation of the white and colored races on the motor buses of a common carrier of passengers in the City of Montgomery and its police jurisdiction violate the due

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F.S. 632, 636; opinion by Judge Learned Hand; *Spector Motor Service v. Walsh,* 2nd Cir., 139 F.S. 809, 814, opinion by Circuit Judge Clark; *Gardella v. Chandler,* 2nd Cir., 172 F. 2d 402, 409; *United States v. Ullum,* 2d Cir., 221 F. 2d 760, 762; "The Attitude of Lower Courts to Changing Precedents," 50 Yale L. J. 1448.

[15] That opinion is entitled to great respect, especially in view of the distinction and learning of the judges who compose that Court, Circuit Judges Parker, Soper and Dobie.

[16] *Shelley vs. Kraemer,* 334 U. S. 1, 21; *Morgan vs. Virginia,* 328 U. S. 373, 380; *Buchanan vs. Warley,* 245 U. S. 60, 74; *City of Birmingham vs. Monk,* 5th Cir., 185 F. 2d 859, 862.

process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States. This holding does not, however, become effective until the entry of formal judgment. The parties are requested to submit to the Court in writing within two weeks from the date of this opinion their views as to the form of judgment to be entered, and as to whether such judgment should be stayed in the event of an appeal.

This the 5th day of June, 1956.

RICHARD T. RIVES
United States Circuit Judge

FRANK M. JOHNSON, JR.
United States District Judge

LYNNE, District Judge, dissenting:

Only a profound, philosophical disagreement with the ultimate conclusion of the majority "that the separate but equal doctrine can no longer be safely followed as a correct statement of law" would prompt this, my first dissent. But I should consider myself recreant both to conscience and duty in withholding my views because of the affection and esteem which I bear for my associates.

For many years as a trial judge in the state and federal systems I have endeavored faithfully to understand and apply precedents established by the opinions of appellate courts. This was not a blind obedience to a legalistic formula embodied in the rule of stare decisis. It was the result of a simple belief that the laws which regulate the conduct, the affairs, and sometimes the emotions of our people should evidence not only the appearance but also the spirit of stability.

Judges of trial courts frequently find themselves in disagreement with the rationale of an old, but clearly controlling precedent. That is so because their positions do not insulate them from those changing physical and metaphysical concepts which form a part of the life process. But they are neither designed nor equipped to perform the legislative function of putting off the old and putting on the new. To arrogate to themselves this prerogative, in my humble opinion, would be the first, fatal step in making hollow the proud boast that ours is a "government of laws and not of men."

Judge Rives, just the other day, delivering the opinion of the Court of Appeals for the Fifth Circuit, sitting

on banc, in *Howard v. United States*, —— F. 2d —— (April 20, 1956), stated my position, clearly and concisely:

> "in the face of such recognition by the Supreme Court of a test of criminal responsibility, we do not feel at liberty to consider and decide whether in our opinion the recent modification of such test in the District of Columbia is sound or unsound, nor whether some other test should be adopted. *This Circuit follows the law as stated by the Supreme Court and leaves any need for modification thereof to that court, . . .* " (Emphasis supplied.)

The majority recognize, it was conceded in oral arguments by counsel for plaintiffs, that *Plessy v. Ferguson*, 163 U. S. 537 (1896) is precisely in point, and that its holding has been repeatedly followed in later transportation cases.[1] Its authority obviously was unaffected by the action of the Supreme Court in dismissing the appeal in *South Carolina Electric & Gas Co. v. Flemming*, —— U. S. ——, 24 L. W. 3280. The citation of *Slaker v. O'Connor*, 278 U.S. 188, is convincing that it did not place the stamp of its approval upon the decision of the Fourth Circuit in *Flemming v. South Carolina Electric & Gas Co.*, 224 F. 2d 752, but simply concluded that its judgment was not final and hence that the appeal did not lie. 28 U.S.C.A. 1254(2).

In complete agreement with the Fourth Circuit's opinion in *Flemming* that the separate but equal doc-

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[1] *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388 (1900); *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U. S. 71 (1910); *McCabe v. A. T. & S. F. Ry Co.*, 235 U. S. 151 (1914).

trine can no longer be safely followed as a correct statement of the law, the majority conclude that *Plessy v. Ferguson,* in which that doctrine made its first appearance sixty years ago, has been impliedly, though not explicitly overruled. While I share their great respect for Judges Parker, Soper and Dobie, I do not at all agree.

A comparatively new principle of pernicious implications has found its way into our jurisprudence.[2] Lower courts may feel free to disregard the precise precedent of a Supreme Court opinion if they perceive a "pronounced new doctrinal trend" in its later decisions which would influence a cautious judge to prophesy that in due time and in a proper case such established precedent will be overturned explicitly. Peculiarly appropriate in this context is the following language of Judge Woodbury, writing for the First Circuit in *New England Mutual Life Ins. Co. v. Welch,* 153 F. 2d 260, 262:

> "Furthermore we find no indication from anything said therein of a purpose to depart from the rule of the earlier decisions cited above. Under these circumstances we see no occasion even to consider the basic question whether we would adopt the doctrine of Barnette v. West Virginia State Board of Education, D. C. 47 F. Supp. 251, 253, and Spector Motor Service v. Walsh, 2 Cir., 139 F. 2d 809,

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[2] *Barnette v. West Virginia State Board of Education,* 47 F. Supp. 251 (1942); *Perkins v. Endicott Johnson Corporation,* 128 F. 2d 208 (1942); *Spector Motor Service v. Walsh,* 139 F. 2d 809 (1943); *Gardella v. Chandler,* 172 F. 2d 402, 409 (1949); *United States v. Ullman,* 221 F. 2d 760 (1955); *United States v. Girouard,* 149 F. 2d 760 (1945); 50 Yale Law Journal 1448.

817, 823, and in extraordinary situations disregard controlling decisions of the Supreme Court not yet explicitly overruled. It will suffice to say that we would feel disposed to consider taking such a course only when there are the clearest indications that the controlling decisions of the Supreme Court, though not formally overruled, would no longer be followed by that Court and we find no such indications here."

In 1950, the Fourth Circuit had before it the case of *Boyer, et al v. Garrett, et al*, 183 F. 2d 582, involving an officially adopted rule providing for the segregation of races in athletic activities in the public parks and playgrounds in the City of Baltimore. In affirming the judgment of the District Court, the same judges who decided *Flemming* held:

"The contention of plaintiffs is that, notwithstanding this equality of treatment, the rule providing for segregation is violative of the provisions of the federal Constitution. The District Court dismissed the complaint on the authority of *Plessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; and the principal argument made on appeal is that the authority of *Plessy v. Ferguson* has been so weakened by subsequent decisions that we should no longer consider it as binding. We do not think, however, that we are at liberty thus to disregard a decision of the Supreme Court which that court has not seen fit to overrule and which it expressly refrained from re-examining, although urged to do so, in the very recent case of *Sweatt v. Painter*, 70 S. Ct. 848. It is for the Supreme Court, not us, to overrule its decisions or to hold them outmoded."

In 1955, in *Flemming*, an intrastate transportation case, reversing the district judge, the court wrote:

> "We do not think that the separate but equal doctrine of Plessy v. Ferguson, supra, can any longer be regarded as a correct statement of the law. That case recognizes segregation of the races by common carriers as being governed by the same principles as segregation in the public schools; and the recent decisions in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 and Bolling v. Sharpe, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884, which relate to public schools, leave no doubt that the separate but equal doctrine approved in Plessy v. Ferguson has been repudiated. That the principle applied in the school cases should be applied in cases involving transportation, appears quite clearly from the recent case of Henderson v. United States, 339 U. S. 816, 70 S. Ct. 843, 94 L. Ed. 1302, where segregation in dining cars was held violative of a section of the interstate commerce act providing against discrimination."

Within this five year interval the Supreme Court had spoken pertinently but once, in the case of *Brown v. Board of Education*, 347 U. S. 483, since *Bolling v. Sharpe*, 347 U. S. 497, did not discuss *Plessy v. Ferguson* and appears to have been decided on a parity of reasoning. My study of *Brown* has convinced me that it left unimpaired the "separate but equal" doctrine in a local transportation case and I perceive no pronounced new doctrinal trend therein.

Of course I appreciate the care with which the Supreme Court limits its pronouncements upon great

constitutional questions to the narrow issues before it and the only issue in *Brown* involved a collision between the Fourteenth Amendment and state laws commanding segregation in the public schools. But in *Brown* the Court's opinion referred to *Plessy v. Ferguson* six times and to its "separate but equal" doctrine on four occasions. It epitomized its concept of that doctrine as follows: "Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate." Its ultimate conclusion was, and this I conceive to be the rationale of its decision, "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

It seems to me that the Supreme Court therein recognized that there still remains an area within our constitutional scheme of state and federal governments wherein that doctrine may be applied even though its applications are always constitutionally suspect and for sixty years it may have been more honored in the breach than in the observance. Granted that the trend of its opinions is to the effect that segregation is not to be permitted in public facilities furnished by the state itself and the moneys of the state, as in the case of public schools, or public parks, *cf. Muir v. Louisville Park Theatrical Association*, 347 U. S. 971; *Dawson v. Mayor and City of Baltimore*, 220 F. 2d 386, affirmed 350 U. S. 877, or municipal golf courses, *cf. Rice v. Arnold*, 340 U. S. 848; *Holmes v. City of Atlanta*, 350 U. S. 879, on the plain theory that if the state is going to provide such facilities at all, it must provide them equally to the citizens, it does not follow that it may not be permitted in public utilities holding nonexclusive franchises.

If that doctrine has any vitality, this is such a case in which it has been applied fairly. According to its teaching not absolute, but substantial equality is required. Such equality is not a question of dogma, but one of fact. Under the undisputed evidence adduced upon the hearing before us practices under the laws here attacked have resulted in providing the races not only substantially equal but in truth identical facilities.

In my opinion the holding of the Court in *Morgan v. Virginia*, 328 U. S. 373, that the attempt of a state to require the segregation of passengers on interstate busses results in the imposition of an undue burden on interstate commerce is wholly irrelevant to the issue before us. And equally inapposite is reference to *Henderson v. United States*, 339 U. S. 816, which held that rules and practices of interstate railroad carriers requiring the segregation of passengers in dining cars were offensive to Section 3(1) of the Interstate Commerce Act making it unlawful for a railroad in interstate commerce "to subject any particular person, . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . ."

The supremacy of the federal government in matters affecting interstate commerce is axiomatic. Cases involving the exercise of its power in that realm shed no light on Fourteenth Amendment problems. It does seem quite clear that by its terms the Congress is given the power and duty to enforce the Fourteenth Amendment by legislation. Thus the Congress would have the power, thus derived, to proscribe segregation in intrastate transportation. It is worthy of note that for sixty years it has not seen fit to do so.

While any student of history knows that under our system of government vindication of the constitutional rights of the individual is not, and ought not to be, entrusted to the Congress, its reticence to intrude upon the internal affairs of the several states should caution us against doing so where the path of duty is not plainly marked and when we must hold a clear precedent of the Supreme Court outmoded.

Because I would dismiss the action on the authority of *Plessy v. Ferguson*, I do not reach the procedural questions discussed in the majority opinion. I respectfully dissent.

SEYBOURN H. LYNNE
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

AURELIA S. BROWDER, and SUSIE McDONALD and CLAUDETTE COLVIN, by Q. P. COLVIN, next friend, and MARY LOUISE SMITH, by Frank Smith, next friend, and others similarly situated,

Plaintiffs,

vs.

NO. 1147

W. A. GAYLE, CLYDE SELLERS and FRANK PARKS, individually and as members of the Board of Commissioners of the City of Montgomery, Alabama, and GOODWYN J. RUPPENTHAL, individually and as Chief of Police of the City of Montgomery, Alabama, and THE MONTGOMERY CITY LINES, INC., a Corporation, and JAMES F. BLAKE, and ROBERT CLEERE, and C. C. (JACK) OWEN, JIMMY HITCHCOCK, and SIBYL POOL, as members of the ALABAMA PUBLIC SERVICE COMMISSION,

Defendants

DARK PAGE BLEED THRU

JUDGMENT

This cause came on to be heard before a three-judge court duly convened pursuant to the provisions of Title 28, United States Code, Sections 2281 and 2284.

After trial on the merits and careful consideration of the evidence therein adduced and after oral arguments and submission of briefs by all parties, the Court, being fully advised in the premises, found in an opinion handed down on June 5, 1956, that the enforced segregation of Negro and white passengers on motor buses operating in the City of Montgomery as required by Section 301 (31a, 31b and 31c) of Title 48, Code of Alabama, 1940, as amended, and Sections 10 and 11 of Chapter 6 of the Code of the City of Montgomery, 1952, violates the Constitution and laws of the United States.

Now, in accordance with that opinion, it is Ordered, Adjudged and Decreed that Section 301 (31a, 31b and 31c) of Title 48, Code of Alabama, 1940, as amended, and Sections 10 and 11 of Chapter 6 of the Code of the City of Montgomery, 1952, are unconstitutional and void in that they deny and deprive plaintiffs and other Negro citizens similarly situated of the equal protection of the laws and due process of law secured by the Fourteenth Amendment to the Constitution of the United States and rights and privileges secured by Title 42, United States Code, Sections 1981 and 1983.

It is further Ordered, Adjudged and Decreed that the defendants, their successors in office, assigns, agents, servants, employees, and persons acting on their behalf, be and they are hereby permanently enjoined and restrained from enforcing the aforesaid statutes and ordi-

nances or any other statutes or ordinances which may require plaintiffs or any other Negroes similarly situated to submit to segregation in the use of the bus transportational facilities in the City of Montgomery, and from doing any acts or taking any action to require the Montgomery Bus Lines, Inc., or its drivers, or any other public bus transportation facility, or its drivers, to enforce such statutes or ordinances requiring the segregation of white and Negro passengers in the operation of public motor bus transportation facilities in the City of Montgomery.

Costs are taxed against defendants.

The injunction granted by this judgment is suspended for a period of ten days from the date hereof, and in the event an appeal is taken from this judgment within such period, such injunction will be further suspended until an additional order can be entered suspending such injunction during the pendency of such appeal.

Judges Rives and Johnson concur in this judgment, Judge Lynne dissents therefrom except as to the order of suspension, in which he concurs.

This the 19th day of June, 1956.

RICHARD T. RIVES
United States Circuit Judge

SEYBOURN H. LYNNE
United States District Judge

FRANK M. JOHNSON, JR.
United States District Judge

DARK PAGE BLEED THRU

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Defendants

ORDER

An appeal having been taken from the final judgment rendered in this case on the 19th day of June, 1956, it is ordered by the Court that the injunction therein granted be and the same hereby is suspended during the pendency of such appeal. This order is made by the assent of all the judges of this Court as evidenced by their signatures hereto.

This 28th day of June, 1956.

RICHARD T. RIVES
United States Circuit Judge

SEYBOURN H. LYNNE
United States District Judge

FRANK M. JOHNSON, JR.
United States District Judge

DARK PAGE BLEED THRU

APPENDIX B

No. 508) (H. 434—Walker

AN ACT

To require and empower motor transportation companies operating in Alabama to provide separate waiting rooms, ticket windows, and accommodations on vehicles for the white and colored races; to prescribe the manner in which this act shall be administered and enforced; and to fix penalties for the violation of provisions of the act.

Be It Enacted By The Legislature Of Alabama:

Section 1. All passenger stations in this State operated by any motor transportation company shall have separate waiting rooms or space and separate ticket windows for the white and colored races, but such accommodations for the races shall be equal. All motor transportation companies or operators of vehicles carrying passengers for hire in this State, whether intrastate or interstate passengers, shall at all times provide equal but separate accommodations on each vehicle for the white and colored races. The conductor or agent of the motor transportation company in charge of any vehicle is authorized and required to assign each passenger to the division of the vehicle designated for the race to which the passenger belongs; and, if the passenger refuses to occupy the division to which he is assigned, the conductor or agent may refuse to carrying the passenger on the vehicle; and, for such refusal, neither the conductor or agent of the motor transportation company nor the motor transportation company shall be liable in damages. Any motor transportation company or person

violating the provisions of this act shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than five hundred dollars for each offense; and each day's violation of this act shall constitute a separate offense.

Section 2. The provisions of this act shall be administered and enforced by the Alabama Public Service Commission in the manner in which provisions of the Alabama Motor Carrier Act of 1939 are administered and enforced.

Section 3. This act shall take effect immediately upon its passage and approval by the Governor or upon its otherwise becoming a law.

Approved July 6, 1945.

No. 130) (H. 138—Ramey

AN ACT

To authorize and empower operators of passenger stations in Alabama operated by or for the use of any motor transportation company, to provide separate waiting rooms, facilities, or space, or separate ticket windows, for the white and colored races: authorizing and empowering motor transportation companies and operators of vehicles, carrying passengers for hire in this state, whether intrastate or interstate passengers, to provide separate accommodations on each vehicle for the white and colored races, to assign or reassign each passenger or person a division, section, or seat on vehicles, designated for the race to which the pas-

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senger belongs; to make it unlawful for any person willfully to refuse or fail to comply with the reasonable rules, regulations, or directives providing such separate waiting rooms or facilities, or space, or separate ticket windows; and to make it unlawful for any person willfully to refuse or fail to comply with any reasonable assignment or reassignment of seats to passengers or persons on passenger vehicles designated for the race to which such passenger or person belongs; to fix the penalty for the violation of this Act.

Be It Enacted By The Legislature of Alabama:

Section 1. All passenger stations in this state operated by or for the use of any motor transportation company shall be authorized to provide separate waiting rooms, facilities, or space, or separate ticket windows, for the white and colored races but such accommodations for the races shall be equal. All motor transportation companies and operators of vehicles, carrying passengers for hire in this state, whether intrastate or interstate passengers, are authorized and empowered to provide separate accommodations on each vehicle for the white and colored races. Any officer or agent of such motor transportation company or operator, in charge of any vehicle is authorized to assign or reassign each passenger or person to a division, section or seat on the vehicle designated by such company or operator, or by such officer or agent, for the race to which the passenger or person belongs; and if the passenger or person refuses to occupy the division, section or seat to which he is so assigned, such officer or agent may refuse further to carry the passenger on the vehicle. For such refusal neither the officer nor agent, nor the motor transportation company, nor operator, shall be liable in damages.

Section 2. It shall be unlawful for any person willfully to refuse or fail to comply with any reasonable rule, regulation, or directive of any operator of a passenger station in this state operated by or for the use of any such motor transportation company, or of any authorized officer or agent of such operator, providing separate waiting rooms, facilities, or space, or separate ticket windows, for white and colored races; or willfully to refuse or fail to comply with any reasonable assignment or reassignment by any officer or agent in charge of any vehicle of any such motor transportation company or of any operator of vehicles carrying passengers for hire, of any passenger or person to a division, section, or seat on such vehicle designated by such officer or agent for the race to which such passenger or person belongs; any person so refusing or failing to comply with any such reasonable rule, regulation, or assignment, as aforesaid, shall be guilty of a misdemeanor and upon conviction shall be fined not more than $500.00 for such offense.

Section 3. This act shall take effect immediately upon its passage and approval by the Governor or upon its otherwise becoming a law.

Approved July 18, 1947.

Section 10, Chapter 6, Code of the City of Montgomery, Alabama, 1952.

"Every person operating a bus line in the city shall provide equal but separate accommodations for white people and negroes on his buses, by requiring the employees in charge thereof to assign passenger seats on the vehicles under their charge in such manner as to

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separate the white people from the negroes, where there are both white and negroes on the same car; provided, however, that negro nurses having in charge white children or sick or infirm white persons, may be assigned seats among white people.

"Nothing in this section shall be construed as prohibiting the operators of such bus lines from separating the races by means of separate vehicles if they see fit." Section 11, Chapter 6, Code of the City of Montgomery, Alabama, 1952.

"Any employee in charge of a bus operated in the city shall have the powers of a police officer of the city while in actual charge of any bus, for the purpose of carrying out the provisions of the preceding section; and it shall be unlawful for any passenger to refuse or fail to take a seat among those assigned to the race to which he belongs, at the request of any such employee in charge, if there is such a seat vacant."